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October Term, 1979

No. 79-1082

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

and

TIDEWATER MOTOR TRUCK ASSOCIATION, HOUFF TRANSFER, INC., and DOLPHIN FORWARDING, INC.,
Respondents.

vs.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATION, et al.,
Respondents.

BRIEF OF RESPONDENT TIDEWATER MOTOR TRUCK ASSOCIATION

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BRIEF OF RESPONDENT TIDEWATER MOTOR TRUCK ASSOCIATION

Counsel for Tidewater Motor Truck Association, Respondent herein, files this brief in support of the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit filed by the Solicitor General on behalf of the National Labor Relations Board. We seek to have the opinion of the Court of Appeals reversed and the orders of the Board reinstated.

I. OPINIONS BELOW

The opinion of the Court of Appeals is not yet officially reported, but may be found in the National Labor Relations Board's Petition for a Writ of Certiorari at pages

1a-83a.[1] The decisions and orders of the National Labor Relations Board are reported at 231 N.L.R.B. 351 and 236 N.L.R.B. No. 42. Bd. Petition 11a; 90a.

II. JURISDICTION

The judgment of the Court of Appeals was entered on September 20, 1979. The Court of Appeals entered an order denying the Board's petition for rehearing on December 13, 1979. Bd. Petition 87a. The jurisdiction of the Supreme Court is invoked under Title 28 U.S.C. Section 1254(1).

III. QUESTIONS PRESENTED

The question presented by the Petitioner is:

Whether the National Labor Relations Board properly concluded that contractual provisions adopted by the union and the employer organizations to deal with containerization in the shipping industry enlarged, rather than preserved, work opportunities for employees represented by the union, and that such provisions therefore violated Section 8(e) of the National Labor Relations Act and that union action to enforce them violated Section 8(b)(4)(ii)(B) of the Act.

To answer this question, two more specific questions must be resolved:

1. Whether the International Longshoremen's Association by entering into agreements with the sea carrier employers of union members sought to acquire work which was not work traditionally performed at the seaport terminals by union members.

2. Whether, even if the contested work "belonged to" the International Longshoremen's Association, the sea carrier employers had the ability to control the contested work and provide it to longshoremen at the seaport terminals.

1. The decisions of the Board and the decision and judgment of the Court of Appeals are contained in the Board's Petition and are hereinafter cited as "Bd. Petition ....." Portions of the transcript in 5-CC-791, *et al.*, not contained in the Joint Appendix are hereinafter cited as "T. Bd. HR". Portions of the transcript in Joint Exhibit 1 in 5-CC-791, *et al.*, which are not included in the Joint Appendix are hereinafter cited as "T. E.D. Va. ....." All other references will be to the Joint Appendix filed in this Court and will be cited as "Jt. App. ....."

IV. STATUTES INVOLVED

The following relevant statutes appear at the indicated pages of the Joint Appendix:

1. Section 8(b)(4) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §159(b)(4). Bd. Petition 2-3.

2. Section 8(e) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §158(e). Bd. Petition 3.

V. STATEMENT OF THE CASES

This case involves attempts by the International Longshoremen's Association (ILA) to monopolize the work of loading and unloading (stripping and stuffing) large shipping containers within areas surrounding seaport terminals. Most containers are large metal boxes 20 to 40 feet long which can contain up to 40,000 pounds of cargo. They can be hauled on a wheeled chassis behind a truck tractor, carried on a railroad car, and stacked on a ship for efficient cargo movement. Steamship companies usually own the containers and lease them out to shippers who stuff them with freight and have them transported by motor carrier or railroad to the seaports for export sea movement. Imported containers are transported across land to the premises of the ultimate consignee or his agent, sometimes a

motor freight terminal or warehouse, where they are stripped. The technological advancement of containers has eliminated a great deal of the need to handle uncontainerized break-bulk cargo a piece at a time at the seaports by labor represented by the ILA. This has caused the ILA to require the steamship companies who employ ILA labor at the seaport terminals to agree to the Rules on Containers. These Rules require that the stripping and stuffing of most containers within 50 miles of the sea piers be performed on the piers by ILA labor, rather than at the off-pier premises of consolidators, motor carriers and warehousemen. These off-pier companies are in the business of stripping and stuffing containers with their own labor not represented by the ILA. The Rules force the shiplines companies to discontinue doing business with them in order to give this work to the ILA labor in violation of §§8(e) and 8(b)(4)(ii)(B) of the National Labor Relations Act.

A. Procedural Posture of the Cases.

This appeal arises from two cases brought before the National Labor Relations Board ("Board"). In the first case, the charging parties were Dolphin Forwarding, Inc. ("Dolphin"), and San Juan Freight Forwarders, Inc. ("San Juan"). Dolphin and San Juan are non-vessel ocean common carriers ("NVOCC") operating pursuant to the Shipping Act, 1916.[2] Both of these companies operated facilities in the Port of New York area where they consolidated less than full loads of goods from one shipper with the goods of other shippers into single full containers (known

2. 46 U.S.C. §§801 *et seq.*; The Federal Maritime Commission has held that NVOCC's are common carriers. FMC No. 73-17 (Sea-Land Service, Inc.), 46 C.F.R. §536.2(b) No. 74-40 (Puerto Rico Maritime Shipping Authority) (PRMSA) (1978). ALJ Decision p. 29.

as less-than-containerloads (LCL)) for more economical shipment by sea. Bd. Petition 93a.

The Council of North Atlantic Shipping Associations ("CONASA") is an employer collective bargaining association, whose membership consists of various shiplines company members, and their associations of shiplines companies, including the New York Shipping Association ("NYSA"), the Hampton Roads Shipping Association ("HRSA"), and the Shipping Trade Association of Baltimore, Inc. ("STA"). All shiplines companies and their associations will hereinafter be referred to as "sea carriers." The sea carriers' employees are covered by collective bargaining agreements with the ILA which represents virtually all of the employees working in the seaport terminals who load and unload the ships and perform related cargo handling. ILA members are employed directly by the sea carriers or stevedoring companies who contract their labor to the sea carriers. Bd. Petition 6a; 17a.[3]

The ILA claimed that the work of (stuffing) parcels of cargo into LCL containers belonged exclusively to the ILA, and that the Rules required that such work be performed by ILA members at the seaport terminals. Bd. Petition 93a-94a. When these Rules were enforced against the sea carriers, they were forced to cease doing business with Dolphin and San Juan. Dolphin and San Juan brought unfair labor practice charges against the ILA and the sea carriers alleging that the Rules were an unlawful hot cargo agreement in violation of Section 8(e) of the Act and their enforcement violated the provisions of

3. The ILA and Teamsters Union have apparently agreed that the line separating the work jurisdiction of each union regarding cargo handling is the outer perimeter of the seaport terminal, or at least where the cargo is placed on the truck. FMC No. 73-17 (Sea-Land Service, Inc.), No. 74-40 (Puerto Rico Maritime Shipping Authority) ("PRMSA") (1978). ALJ Decision at pp. 21-22.

Section 8(b)(4)(ii)(B) of the Act. The parties waived the making of findings of fact and conclusions of law and issuance of a decision by the Administrative Law Judge. Bd. Petition 91a. The Board considered the entire record made before the Law Judge and ruled that the object of the ILA's Rules and its efforts to enforce the Rules were directed toward acquiring work not historically performed by its members at the sea terminals, rather than to protecting traditional ILA work. Bd. Petition 94a-99a.

In the second case, Tidewater Motor Truck Association ("TMTA"), Houff Transfer, Inc. ("Houff"), and Associated Transport, Inc. ("Associated"), brought unfair labor practice charges alleging similar violations. TMTA is an association composed of twenty-eight members, including Associated, which are engaged in interstate motor transportation, warehousing and delivery of general freight and commodities within 50 miles of the Port of Hampton Roads, Virginia. Bd. Petition 138a-139a.

Houff is an ICC licensed motor common carrier with facilities located in five states, including a freight terminal in Baltimore, Maryland and one in Norfolk, Virginia. Jt. App. 22-23. It has operated its Baltimore facility since 1946. Jt. App. 33. It has operated its Norfolk facility since 1952. Jt. App. 33. Houff's employees, unrepresented by any labor organization, load and unload cargo from containers and trucks. Jt. App. 34-35. The distance travelled by Houff to final destination of most shipments ranges between 150 and 450 miles. Jt. App. 25.

Associated is also an ICC licensed common carrier which operated a motor freight terminal in Virginia Beach.[4] Jt. App. 56-57. Associated's drivers were represented by the Teamster's Union but the terminal employees were

4. Associated is no longer in business.

unrepresented. Jt. App. 57. The average distance of hauling performed by Associated was about 450 miles. Jt. App. 57.

The respondents in the *Associated* case were the ILA, and its locals, and CONASA, and its sea carrier members, including HRSA and STA. The charges alleged that the respondents violated Sections 8(e) and 8(b)(4)(ii)(B) of the Act by negotiating and enforcing the Rules, mainly with respect to stripping parcels from imported LCL and full shipper's load (FSL) containers away from the seaport terminals with non-ILA labor.[5] The Administrative Law Judge found violations of the Act had occurred. Bd. Petition 166a-168a. As in *Dolphin*, the Board affirmed because this work had not historically been performed by the ILA. Bd. Petition 115a.

The ILA and CONASA appealed the Board's decisions and orders in *Associated* and *Dolphin* to the Court of Appeals for the District of Columbia Circuit. The two cases were consolidated on appeal. Bd. Petition 2a. Houff intervened at the beginning of the Court of Appeals proceeding, and TMTA and Dolphin were permitted to intervene after the Court of Appeals had issued its decision. Bd. Petition 1a. San Juan and Associated did not intervene. By a two to one majority the Court of Appeals refused to enforce the Board's orders, because it found that the Board had defined the work improperly in reaching the conclusion that the contested work did not historically belong to the ILA:

> When defining the work in controversy . . . the Board settled on off-pier stripping and stuffing of containers.
>
> * * *
>
> Rather than define a category of work based on work patterns both prior and subsequent to the innovation

5. Full shipper's load containers are those which contain cargo from a single shipper.

[of containers], the Board has defined the work in controversy specifically in terms of the innovation, thus *by definition* removing any opportunity for the pre-innovation workers to preserve their work. Bd. Petition 46a-47a.

B. History of Cargo Handling in the Seaports and on the Land Beyond.

The development of containerization and the Rules agreements directed at limiting their use began in the Port of New York. This history, much of it preceding the chronology of events in these cases, has been extensively developed in the records of similar cases dealing with the issues involved herein.[6] The Court of Appeals for the District of Columbia Circuit criticized the Board for its alleged failure to focus in the present cases on the historical work of longshoremen along the whole eastern seacoast in determining whether the Rules were aimed

6. Other Circuits of the Court of Appeals have agreed with the Board that off-pier container stripping and stuffing was not the work of the ILA; and therefore, its efforts to claim this work violated the Act. *International Longshoremen's Association (Consolidated Express, Inc.)*, 221 N.L.R.B. 956 (1975), *enf'd*, 537 F.2d 706, 712 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977), *rehearing denied*, 430 U.S. 911 (1977) ("*Conex I*"); *International Longshoremen's Association, Local 1575 v. NLRB*, 560 F.2d 439, 447 (1st Cir. 1977); *Humphrey v. International Longshoremen's Association*, 548 F.2d 494, 499 (4th Cir. 1977). *See also, Consolidated Express, Inc. v. New York Shipping Association*, 602 F.2d 494 (3rd Cir. 1979), *petitions for cert. filed*, 48 U.S.L.W. 3001 (U.S. 1979) (Nos. 78-1902 and 78-1905), where the Court of Appeals sent the case to trial to determine liability and damages for the monopolistic impact of the rules, pursuant to Section 4 of the Clayton Act. 15 U.S.C. §15. With respect to similar claims for work made by International Longshoremen's and Warehousemen's Union on the west coast, the Board reached the same conclusion and was affirmed. *International Longshoremen's and Warehousemen's Union Local 13*, 208 N.L.R.B. 994 (1974), *affirmed per curiam*, 515 F.2d 1017 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 942 (1976) (*California Cartage*). *See also, International Longshoremen's Association (Shipside Packaging Co.)*, 227 N.L.R.B. 659 (1976).

at work protection or work acquisition. The factual resolutions by the Board in the present and other Board cases dealing with the same issues at other ports cannot be disputed. Since the Rules are being enforced on the entire eastern seaboard and gulf coasts and the Court's decision herein will uniformly affect the sea and land freight handling industries on both coasts, the broadest possible examination of the public record is desirable and we respectfully submit is permissible.[7]

1. The Traditional Methods of Break-Bulk and Containerized Cargo Handling by Longshoremen and Truckers.

Sea carrier employees represented by the ILA have traditionally loaded and unloaded all ocean transported break-bulk cargo to and from ships. ILA members have also traditionally moved break-bulk cargo between the end of the pier and the ship. Jt. App. 109-114.

Motor carriers have traditionally hauled break-bulk cargo to and from the seaport terminals for the shipper and consignee. Jt. App. 111-112. Shippers or their agents, known as brokers or freight forwarders,[8] have usually contracted with a licensed motor carrier to deliver export cargo to the pier. When the motor carrier reached the pier with export cargo an ILA clerk checked it in and directed the driver to the appropriate spot on the pier allocated for his cargo. Jt. App. 111-112. The truck driver moved

7. *West Ohio Gas Co. v. Public Utilities Commission of Ohio*, 294 U.S. 63, 70-71 (1934); *Bienville Water Supply Company v. City of Mobile*, 186 U.S. 212, 217-218 (1901); *Muller v. Oregon*, 208 U.S. 412, 421 (1907).

8. A freight forwarder under the Shipping Act is in the business of "dispatching of shipments of any person on behalf of others, by accompanying common carriers . . . and handling the formalities incident to such shipments." 46 U.S.C. §801. They do not issue bills of lading in their own name. A land freight forwarder is similarly defined. 49 U.S.C. §10102(8).

the cargo to the tailgate of the truck where an ILA freight handler removed it from the tailgate. Jt. App. 112. Bd. Petition 140a. An ILA checker tallied the cargo and directed that it be bunched on pallets to conserve pier space. T. Bd. HR 575-576. After the cargo was palletized, an ILA forklift driver moved it from the pier to the sling with which it was hoisted into the hold of the ship. Jt. App. 113. Each piece of cargo was individually stowed by ILA members. Jt. App. 110.

For import break-bulk cargo the whole process was reversed. Jt. App. 110. Import cargo destined for delivery to several consignees by different motor carriers was sorted or separated for pickup by placing it on "marks". Jt. App. 110-111. Cargo moving from a single shipper to a single consignee required no sorting by ILA members and was all placed on one mark pending pickup by the trucker. T. Bd. HR 821.

Typically, the shipper retained a broker or agent in the port area who contracted with a motor carrier to pick up designated cargo at the pier. Jt. App. 57; 183. The broker issued a delivery order, showing where the shipment originated, its contents, and its destination. Jt. App. 24. The order instructed the sea carrier to deliver to the motor carrier the cargo listed in the order. T. Bd. HR 405; Bd. Petition 149a. The broker also provided the motor carrier with a bill of lading which identified the shipper, the number, weight and nature of the cargo, its destination, and whether the freight charges are collect or prepaid. T. Bd. HR 172; Bd. Petition 149a. A bill of lading is a contract between the shipper and the carrier establishing the rights and responsibilities of the carrier during movement.[9] Bd. Petition 149a. This contract re-

9. *Michigan Central Railroad Company v. Mark Owen & Company*, 256 U.S. 427 (1920); *U.S. v. Mississippi Valley Barge Line Company*, 285 F.2d 381, 390 (8th Cir. 1960); *Pennsylvania Railroad Company v. Greene*, 173 F. Supp. 657 (S.D. Al. 1959).

quires the carrier to be responsible for the cargo from the time the bill of lading is issued until the goods are delivered. Jt. App. 48-49; 72; 189. The motor carriers' bill of lading states: "Sec. 2(a) No carrier is bound to transport said property *by any particular schedule, train, vehicle or vessel. . .*" Jt. App. 299. (Emphasis added). No bill of lading covering sea movement is in evidence.

Containerization greatly changed the physical elements of cargo movement at the piers and beyond, but not the regulatory or contractual elements. Shippers who have full motor trailer loads usually truck them directly to the piers where the cargo is stuffed into containers by ILA members. When the shipper so designates, as occasionally happens, less than full loads of cargo are trucked to the pier where they are consolidated with cargo from another shipper into one container by the sea carrier using ILA labor. *Conex I*, 221 N.L.R.B. at 959, n.16. More often, however, shippers having less than full loads direct their goods to be delivered to a NVOCC, like Dolphin, having a facility near the pier. By consolidating the goods of more than one vender into a fully loaded container, the NVOCC can charge the vender a lower tariff rate than it would cost the vender to pay the sea carrier to move the less than full load. NVOCC's offer services not offered by sea carriers. NVOCC's prepare bills of lading, delivery orders, and other paper work necessary for cargo movement for land and sea. NVOCC's also issue through bills of lading covering the movement of the cargo from their facilities to the point where the consignee's agent accepts delivery. Such bills make the NVOCC responsible for the cargo the entire way, even during the ocean movement. The NVOCC thus became the primary water carrier which

subcontracts with the sea carrier for the water movement of the cargo.[10]

The procedure followed by motor carriers picking up containers from the import terminal differs little from that historically used for pick up of break-bulk cargo. The dispatching and checking is the same. The difference is that instead of ILA labor placing the cargo a piece at a time on the tailgate of the truck, the container is simply loaded on a wheeled chassis, owned by the sea carrier and leased as a part of the container, hooked to the motor carrier's truck, and driven away to its destination. JT. App. 43; 57-58.

The motor carriers and warehousemen have never had contracts with the ILA or sea carriers regarding how cargo will be handled after it is hauled from the seaport terminal, whether in break-bulk or container form. Bd. Petition 149a-150a. They have always handled cargo in their possession under their own bills of lading or through bills issued by NVOCC's without regard to the ILA or the sea carriers. Jt. App. 453-454.

Since the motor carriers lease the containers on their wheeled carriages from the sea carriers, the sea carriers will not turn a container over to a motor carrier unless prior to leaving the pier with the container the driver signs an "equipment interchange agreement." Jt. App. 29; 58; 64. The agreement sets out the rights and obligations of the lessee-motor carrier when it takes custody of the container. Bd. Petition 149a-150a. The agreement states that the motor carrier lessee shall:

> (e) have *complete control and supervisions of such containers* or chassis while in its custody and possession; *and shall control the detail of the work of any employee or agent operating or using said containers* or chassis during such time any person operating, transporting, in possession of, or using any such container or chassis after the signing of said Equipment Interchange Receipt and Inspection Report and until such form is again signed upon return of the container or chassis to the lessor is not the agent or employee of the lessor for any purpose whatsoever; . . . Jt. App. 413; Bd. Petition 151a-152a. (Emphasis added).

10. FMC Nos. 73-17 (Sea-Land Service, Inc.), 74-40 (Puerto Rico Maritime Shipping Authority) (1978).

In addition to this agreement, certain sea carriers including U.S. Lines, and several motor carriers, including Associated and Houff, have subscribed to a Uniform Intermodal Interchange Agreement. Jt. App. 347. The Intermodal Agreement provides in relevant part:

> 4.1 Responsibility of User in Possession of Equipment.
>
> a. User shall have the *right of complete control* and supervision of equipment while in its possession and shall be responsible for returning the equipment in the same condition as received, ordinary wear and tear expected. Jt. App. 353. (Emphasis added).

Neither the interchange agreement, the bill of lading, nor the ICC regulations restrict the motor carrier's right to stuff or strip containers. Bd. Petition 149a. Ninety-nine percent of the time the sea carriers have no knowledge of whether the motor carrier intends to strip a container. Jt. App. 19.

Administrative Law Judge Wagman found:

> Frequently, after hauling a full shipper's load from a pier to its port area terminal, a motor carrier will utilize its own employees to strip the full shipper's

load from the container and stuff it into the motor carrier's container for transportation to the consignee. Bd. Petition 151a.

Motor carriers have stripped containers for years in the Hampton Roads port area. Jt. App. 45; 53; 74; 187. This stripping has frequently been performed by employees represented by the Teamsters Union which claims this work as Teamster work. Jt. App. 42-45; 57. However, with the adoption of the Rules the ILA claimed the right to strip all containers, whether LCL or FSL, coming through the ports destined for delivery inland beyond a 50-mile radius of the ports which were stripped within the 50-mile limit. Bd. Petition 148a. FSL containers stripped within the 50-mile limit were said to have been "short stopped" and were considered by the ILA to be treated as LCL containers. Jt. App. 127-128. The ILA also claimed that the Rules granted to its members the right to strip a container at any location, even hundreds of miles from the port area, whenever it is stripped before it reaches its ultimate destination. Jt. App. 41; T. Bd. HR 720. The Rules require the sea carriers to be the guarantors of this claimed right. T. Bd. HR 720.

Motor carriers strip containers for various reasons. First, some containers violate state highway and bridge weight restrictions. Bd. Petition 151a-152a. Second, they must be stripped for safety reasons. Bd. Petition 151a 152a. On many roads, particularly in the sharply curved mountainous West Virginia area and in wet weather, pulling a fully loaded container weighing 40,000 pounds is unreasonably hazardous. Jt. App. 28; 185-186. Third, considerations of economy many times dictate stripping of containers. Under the terms of the equipment interchange agreement a motor carrier pays a per diem rental charge for the leased containers. By transferring cargo to motor carrier equip-

ment and returning the sea carrier's container, a motor carrier reduces its costs. Jt. App. 29; 198-199. Fourth, some containers have a fifth wheel pin on their chassis which hits the wheels of a truck tractor. This contact will ruin two tires on certain tractors, and on others will totally prevent carriage. Jt. App. 32; 69. Finally, many containers are only 20 feet long. Conventional common carrier trailers have twice that capacity. With delivery by conventional equipment a motor carrier delivers cargo to a consignee's location and picks up another load in the consignee's vicinity for carriage on the return trip. If a sea carrier's 20 foot container must be used on such a trip, a motor carrier would have to return empty, return with half a load, or wait days or weeks until a load small enough to fit into the container became available. Even if such a load were transported it could generate only half of the revenue of a conventional full load. Jt. App. 32-33.

2. History of Containerization and the ILA Rules on Containers.

Some cargo has always been moved in shipping containers holding multiple pieces of cargo. Historically longshoremen have never broken open these containers and rehandled the cargo; they simply treated the container as one piece of cargo for purposes of loading and unloading and marking it for pickup by the motor carrier. Jt. App. 128-129. Large reusable containers measuring 8′ x 8′ x 10′, known as "Bowling Green Vans", were used to ship multiple pieces of cargo as a single container of cargo through the Port of New York prior to World War II. They were used for the carriage of personnel effects and were passed through the port without ILA stripping. Jt. App. 115-116. In the late 1940's "APL" containers, measuring 4′ x 6′ x 6′, were similarly used. Jt. App. 115. In

the 1950's longshoremen passed through the port of New York without stripping large cargo "Conex" containers measuring 8′ x 8′ x 8′, owned by the United States government and used for the transporting of military equipment. Jt. App. 115; 210. T. Bd. HR 636. Also in the early 1950's "Dravo" containers, measuring 8′ x 8′ x 8′, began to be used. Jt. App. 115; 150. Because cargo moved in Dravo containers required special protection, the individual pieces of cargo were stripped from the container at the pier by ILA members and put in a storage locker. Jt. App. 116.

By the late 1940's or early 1950's, companies unrelated to sea carriers employing laborers not represented by the ILA were soliciting, receiving and consolidating miscellaneous small shipments of goods and transported the loose cargo from off-pier facilities to the dock for shipment to Puerto Rico. With the advent of containerization, the same companies, now called NVOCC's or consolidators (such as Dolphin), stuffed these shipments of goods into containers at their off-pier facilities. The containers were then transported to the docks to be loaded aboard ship by longshoremen. The consolidators solicited their own consolidation work from their own customers.[11]

Consolidation in the "coastways business", along the east coast, began in the early 1950's, with the blessing of the ILA. The break-bulk transportation system could not economically compete with the rail industry for cargo transportation business on the eastern seaboard. According to ILA president Thomas Gleason:

> We gave them [the coastal container operators] freewheeling and they paid the royalty of $.28 a ton into a fund for us. T. Bd. HR 755-756.

11. *Consolidated Express, Inc.*, 221 N.L.R.B. at 956.

Shortly after the Dravo and Conex containers appeared in the Port of New York, cargo trade between Puerto Rico and the United States became completely containerized. Jt. App. 117. By 1957, the Pan-Atlantic Steamship Company, subsequently renamed the Sea-Land Steamship Line, was operating full containerships built to carry containers stacked on top of one another. Jt. App. 117. The ILA blessed this initial development of containerization:

> [T]here wasn't too much of a problem with the Puerto Rican [container trade], because they started it in an area where they didn't have too much work. They started it in Newark. And, therefore, it was a new operation to that group of people. The company started business and everybody that they hired was new. It was a job for someone for whom there wasn't that much work in the beginning. Okay. So it meant something to those people. Therefore, that operation got off the ground and got going because it started where it was started, with a group that was depressed. Jt. App. 117.

By 1959, fifteen to twenty years after the first reusable shipping containers appeared in the Port of New York, the ILA first negotiated with the sea carriers certain restrictions on the use of containers there. Jt. App. 119; Bd. Petition 14a-15a. This agreement made clear the sea carriers had the right to continue to use containers of any size without restriction on stripping and restuffing them by ILA labor at the pier. The ILA agreed that import or export FSL containers could move through the port without ILA interference. Jt. App. 119-120. The parties also agreed to certain ambiguous language relating to the contracting out by the sea carriers of stuffing and stripping work, but the provision did not address specifically the work performed on LCL containers by consoli-

dators, motor carriers or warehousemen working off the pier.[12] It was not until 1973 that the ILA specifically claimed in the Rules the right to strip and restuff all export LCL containers shipped by consolidators and took action to consistently enforce that claim.[13] The sea carriers agreed to contribute to a jointly administered fund certain royalty payments on containers passing through the port without being stripped or stuffed by ILA labor. Jt. App. 17-18. This agreement remained unchanged until 1968. When the 1959 agreement was negotiated ILA president Thomas Gleason reconciled himself to the fact that import FSL containers would move through the port areas without being stripped by ILA labor.[14] The 1959 contract terms for wages, hours and working conditions negotiated by the ILA and the NYSA were adopted by the parties in other North Atlantic ports, including Boston, Philadelphia, Baltimore, Hampton Roads, Providence and Portland, but the provisions relating to containerization were not adopted for those other ports. Jt. App. 120; T. Bd. HR 723.

Containerization in the Ports of Baltimore and Hampton Roads became significant in the early 1960's. Jt. App. 74; 78; Bd. Petition 139a-140a. The use of containers substantially reduced the cost of shipment at sea through reduction of the number of workers required to load and un-

12. *Consolidated Express, Inc.*, 221 N.L.R.B. at 960, 968.

13. Although limited ILA stripping and restuffing occurred between 1959 and the execution of the Dublin Supplement in 1973, these actions coincided with contract negotiations. The Board has held that the ILA in these circumstances acted merely to bolster its bargaining position. *Consolidated Express, Inc.*, 221 N.L.R.B. at 960, Bd. Petition 152a-153a.

14. "Q. But, Mr. Gleason, it is true that you were reconciled, were you not, to the fact that these containers were going to move from the dock on out to the consignee without any ILA labor? A. Yes, I guess I did. Q. You are reconciled to that fact and you were going to get a royalty on those containers that moved that way? A. Right." Jt. App. 155.

load ships, reduction of dockside ship tie up time, and reduction in loss of pilferage and damage at the port areas. Jt. App. 115; 205. The 1965 ILA agreement covering longshore labor in the Ports of Baltimore and Norfolk contained no rules directed toward containers. Bd. Petition 140a. From the outset of containerization in these ports it was the practice to have ILA labor strip import LCL containers and FSL containers stuffed at the export pier by ILA labor, but not other FSL or LCL containers. Bd. Petition 140a-141a. In the Port of Baltimore in 1974 FSL containers constituted 80 to 85 percent of all import container traffic. Bd. Petition 152a.

The 1968-71 collective bargaining agreement between the ILA and the sea carriers included a new provision requiring that all containers meeting the following criteria "shall be stuffed and stripped by ILA longshore labor . . . performed on a water front facility, pier or dock."

(1) Containers owned or leased by employer signatory members (including containers on wheels) *which contain LTL loads or consolidated full container loads.*[15]

(2) Such containers which *come from or go to any person* (including a consolidator who stuffs containers of outbound cargo or a distributor who strips containers of inbound cargo and including a forwarder, who is either a consolidator of outbound cargo or a distributor of inbound cargo) who is *not the beneficial owner* of the cargo.

(3) *Such containers* which come from or go to *any point within* a geographical area of any port in the North Atlantic District described by a *50-mile circle* within its radius extending out from the

15. Also known as LCL containers.

> center of each port. It is understood that the center of Hampton Roads will be defined as Middle Ground Light. Jt. App. 238-239; Bd. Petition 141a-142a. (Emphasis added).

Initially these rules were not claimed by the ILA to apply to any FSL containers destined for consignees or warehouses inside or outside the 50-mile limit. Jt. App. 12-14. The sea carriers very clearly understood in 1968 that the Rules applied only to LCL containers; it "wasn't conceivable" to the sea carriers that the rules could apply to FSL containers. Jt. App. 96; 98. The 1968 Rules agreement contained a requirement that the sea carriers pay the ILA a royalty of $1 per gross ton of containerized freight off loaded from a fully containerized vessel and passing through the pier free of stripping and stuffing by longshoremen. Jt. App. 236-237.

However, by 1969 ILA longshoremen in the ports of Baltimore and Hampton Roads were requiring stripping by ILA labor of FSL containers which were to be delivered within 50 miles of the ports to public warehouses, such as those operated by D. D. Jones Co., or to motor freight terminals, such as those operated by Associated and Houff. Bd. Petition 142a. The ILA's decision to strip these containers delayed the transportation of this cargo an additional five to eight days. Jt. App. 206. The cargo also suffered additional pilferage before it was released to the motor carriers. Jt. App. 205. The added expense of ILA stripping was estimated by one major shipper at $400 per container. Jt. App. 205. When agents for the shippers became apprised of the new ILA restrictions they diverted shipments to other ports, costing warehousing operations in Hampton Roads a great deal of revenue. Jt. App. 82-83. Allie S. McNeil, vice president of D. D. Jones Co., a local cartage and warehouse operation, and president of TMTA explained the impact:

> Well, it restrained our operations. It affected our growth, it affected naturally the business aspect of our company which had been in existence for almost 40 years. It caused us to lose a lot of accounts. Accounts would no longer use the area. Instead of using us as a public service company, they would take the goods to other facilities of their own or other outlying areas which would be greater distances from the port area. Jt. App. 77-78; 80.

This new ILA practice of stripping all FSL cargo destined for warehouses differed from the practice in New York during the same period where containers were permitted to go to warehouses without ILA stripping. Jt. App. 79; T. Bd. HR 819-820. ILA president Gleason recognized that "warehousing on certain commodities has been from time immemorial a part of the transportation business." T. Bd. HR 770.[16]

During the period of the 1968-71 collective bargaining agreement FSL containers, other than those moving to port area warehouses, passed through the ports of Baltimore and Hampton Roads without ILA stripping. Motor carriers like Associated and Houff continued to strip these containers at their own freight terminals within the 50-mile area, and restuff the cargo into their own road equipment for transport to the ultimate consignee's place of business. Jt. App. 54; Bd. Petition 151a-153a; 165a.

The ILA's 1971-74 collective bargaining agreements for the ports of Baltimore and Hampton Roads contained the same CONASA-ILA container rules as found in the 1968-71 New York agreements. The royalty provision for containers not stripped or stuffed by the ILA was increased to

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16. However, to Mr. Gleason, "bona fide" warehousing connoted a permanent inventory. T. Bd. HR 770-771. Bona fide warehousing later was redefined by the ILA to mean that FSL cargo had to remain in the warehouse for 30 days. T. Bd. HR 819.

$2.00 per gross ton. Jt. App. 245-247. During the early part of this period motor carriers in the ports of Baltimore and Hampton Roads continued to strip FSL containers, although the ILA continued to strip all FSL containers destined for public warehouses in these areas. Jt. App. 54; Bd. Petition 165a. At the same time, FSL containers continued to pass through the Port of New York to be stripped at both truck terminals and warehouses within two miles of the Port. T. Bd. HR 819-820.

CONASA and ILA representatives met in Dublin, Ireland in 1973 to focus on these two disagreements between the ILA and the sea carriers regarding containerization in all ILA ports: (1) ILA stripping and restuffing of containers consolidated off pier by consolidation companies operating export warehouses within 50 miles of the port; and, (2) ILA stripping of FSL containers bound for warehouses within the port areas. T. Bd. HR 677; 773.

Although no container rules had theretofore specifically addressed warehousing practices, the parties promulgated an "Interpretative Bulletin," known as the "Dublin Supplement", which set forth conditions which were supposed to conform the Baltimore and Hampton Roads ILA container handling practices to those followed in New York. Bd. Petition 144a-145a. The Dublin Supplement permitted FSL containers to pass through the ports, to a warehouse without ILA stripping if the cargo was to be warehoused at a "bona fide public warehouse" in the normal course of the beneficial owner's business; the beneficial owner of the cargo could not transfer title to its goods for at least 30 days; and the consignee had to pay at least 30 days storage fees. No language required physical storage for any length of time. The owner of the goods was also required to furnish documentation of compliance to the ILA-CONASA Container Committee. The Rules made it

clear that under no circumstances could a motor carrier freight transfer terminal be considered a bona fide public warehouse. Bd. Petition 144a-147a. The interpretation was supposed to relax the ILA work claims to FSL containers in the Ports of Baltimore and Hampton Roads. Jt. App. 79-80. Instead, the Dublin Supplement was interpreted by the ILA to mean that for the first time FSL containers could no longer pass through the ports on their way to destinations beyond the 50-mile limit, by way either of truck terminals or public warehouses without being stripped at the seaport by ILA labor. Jt. App. 151; Bd. Petition 165a-166a.

At least some sea carriers disagreed with the ILA's claim to the work of stripping and stuffing FSL containers in the Hampton Roads and Baltimore ports. As late as April 11, 1974, George Maier, port manager of U.S. Lines and an officer in various sea carrier associations, wrote a letter to Richard Hughes, administrator of the container royalty fund in Baltimore, in which he explained that a controversy existed as to the justification for container fines relating to motor carriers' stripping containers and transferring cargo to their own equipment. Jt. App. 93-94. Mr. Maier stated:

> It is a matter of record with the management structure of CONASA that the validity of these fines is in serious doubt. And it is now my understanding that there are also some doubts existent among ILA-CONASA representatives. Jt. App. 93-94.[17]

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17. The practice conformed to this understanding. As noted by Administrative Law Judge Wagman, the "paucity" of complaints concerning motor carriers stripping FSL containers supports the credibility of George Maier's testimony that the Rules were not to apply to FSL containers stripped by motor carriers. Between 1965-1974 the Joint Container Committees for Baltimore and Hampton Roads resolved various complaints alleging viola-

(Continued on following page)

The Dublin Supplement was included in the ILA collective bargaining contracts in Baltimore and Hampton Roads, effective October 1, 1974 through September 30, 1977. The contracts, for the first time since the advent of containerization in these ports, also subjected sea carriers to fines of $1,000 per container in the event LCL and FSL containers were stripped by motor carriers in the port areas by other than ILA labor. Although ILA fines were to be imposed on the sea carriers and not on motor carriers or warehousemen,[18] the sea carriers made clear their intent to pass any fines onto the motor carriers. T. Bd. HR 347; 415. The motor carriers and warehousemen objected and informed the sea carriers that they would not comply with the Rules or pay the fines. T. Bd. HR 416; G.C. Ex. No. 5.

Under the 1974-77 ILA-CONASA agreement, both parties retained the right to cancel and renegotiate the Rules on 30 days written notice. Jt. App. 260-261. In late March, 1975, the ILA notified CONASA of its intent to exercise this right, because the ILA alleged that motor carriers using freight terminals and warehousemen in Baltimore and Hampton Roads were not complying with the 30 day warehouse rule. The ILA claimed that

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Footnote continued—

tions of the Rules. In 1969 a single steamship company, U.S. Lines, handled 4,000 to 5,000 import containers in the Baltimore port of which 80 to 85 percent were FSL containers. By 1974, the same line handled 24,000 containers stripped at the pier. During this period only 26 complaints involved the stripping of 45 to 50 FSL containers by motor carriers. Prior to the September 11-13, 1972 meeting at Miami Beach only five complaints involving a total of eight containers were filed. The number of complaints filed in Hampton Roads was even fewer. Bd. Petition 152a-153a; 165a.

18. The ILA recognized the motor carriers and warehousemen had the right to strip and stuff the containers once they had possession of them, but such right didn't protect the sea carrier. T. Bd. HR 720.

any facility used to strip containers and restuff cargo into motor truck-trailers for shipment before 30 days of storage were phony warehouses. Bd. Petition 158a. On April 28, the Rules were suspended, and ILA labor began stripping all import containers of cargo destined to public warehouses within 50 miles of the center of the Ports of Hampton Roads and Baltimore, but not FSL containers destined to points beyond 50 miles which were picked up by an over-the-road carrier. Bd. Petition 158a-159a. The ILA's insistence on stripping containers destined to port area warehouses caused the same problems for warehousemen as the similar action had caused in 1969. Jt. App. 82. Cargo was delayed for up to a week; pilferage costs increased; shippers' agents diverted cargo from warehouses customarily patronized; and warehousemen again lost revenues. Jt. App. 82-83; 205.

On May 30, 1975, CONASA and the ILA executed a Supplemental Agreement which, they announced, "clarified and reinstated" the 1974 Rules. Bd. Petition 159a. To Rule 2 B(4) was added the condition that the warehouse receiving an unstripped FSL container must actually store the cargo for a minimum period of 30 days. An additional limitation was directed at motor carrier freight terminals to prevent them, for the first time, from stripping any containers:

> In keeping with prior CONASA-ILA decisions trucking stations where containers are unloaded within the geographic area do not constitute bona fide public warehouses even where cargo is destined for delivery outside the geographic area. Bd. Petition 159a-161a.[19]

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19. The Supplemental Agreement also added a new provision requiring royalty payments on containers passed through ILA manned ports via the "land-bridge" system, whereby shipment from a foreign origin to a foreign destination could be bridged across the U.S. by rail or motor carrier for further sea movement.

C. The Climax: Incidents Involving Dolphin, Houff and Associated.

1. Houff

On February 19, 1974, Houff picked up from the U.S. Lines at its Dundalk Marine Terminal in the Port of Baltimore two 20 foot FSL containers. The cargo was consigned to Union Carbide Corporation in Alloy, West Virginia, approximately 425 miles from the Baltimore port. Bd. Petition 153a-154a. Houff also picked up one 20′ full shippers load container from Lavino Shipping Company with cargo consigned to Merck & Company, Elkton, Virginia. Bd. Petition 154a. Houff determined that because the containers were overloaded, they violated West Virginia highway weight restrictions and were unsafe to drive through the mountains. Their rental was also a needless expense. Houff stripped the containers at its freight terminal within the 50-mile limit and reloaded the cargo into Houff truck trailers. Bd. Petition 154a. That same day the ILA learned that Houff had stripped the three containers.

The following day the ILA complained to the Container Committee that Houff had violated "the container agreement," and that liquidated damages of $1,000 and $2,000 were due the ILA from Lavino and U.S. Lines, respectively. Bd. Petition 154a. On March 21, the Container Committee determined that U.S. Lines had violated the contract as the ILA had alleged and assessed the requested fine. On May 10, the Committee found Lavino guilty of violating the Rules and assessed it a fine of $1,000. Bd. Petition 154a.

U.S. Lines and Lavino paid the fines to the Container Royalty Fund, and requested indemnification from Houff. U.S. Lines threatened to terminate Houff's interchange

agreement if Houff did not comply. Lavino even threatened to have Houff entirely banned from the port. Effective July 22, 1974, U.S. Lines terminated its equipment interchange agreement with Houff. Lavino terminated its equipment interchange agreement with Houff six months later. Bd. Petition 154a-155a. Since then, U.S. Lines and Lavino have refused to release containers to Houff. Bd. Petition 155a. As of September 17, 1975, Houff estimated that it had been unable to pick up more than 100 shipments as a result of cancellation of its interchange agreements. Jt. App. 186-187.

2. Associated

On September 24, 1974, Associated sent two truck tractors to the Marine Terminal in Norfolk, Virginia. The drivers presented delivery orders and bills of lading and picked up eight FSL containers from U.S. Lines. Five of these containers were destined to North Carolina and three to Tennessee. When the eight containers arrived at Associated's Virginia Beach Terminal, seven or eight miles from the seaport terminal, all eight containers were stripped by Associated employees and the cargo was reloaded into Associated's own road equipment for hauling to the consignee. Jt. App. 60-61; Bd. Petition 155a. On October 5, 1974, representatives from U.S. Lines and the ILA discovered that Associated had stripped the eight containers within the 50-mile limit. U.S. Lines was fined $8,000, which Associated refused to reimburse to it. Bd. Petition 156a. On February 15, 1974, U.S. Lines discontinued interchanging equipment with Associated, and formally terminated its interchange agreement with Associated on March 20, 1975. Associated was unable thereafter to pick up containers in the port. Jt. App. 63-64; Bd. Petition 157a.

3. Dolphin

Dolphin and San Juan operated solely as consolidators of export cargo in the port area of New York. Their customers shipped goods to their facilities where they were consolidated with goods of other shippers into LCL containers. The LCL containers were then trucked to the seaport terminals for sea movement. Beginning on August 27, 1974, and continuing through January 23, 1975, the ILA fined the sea carriers $47,000 for stuffing done by Dolphin and San Juan. When they refused to reimburse the sea carriers involved, they informed Dolphin and San Juan that they would no longer furnish them with containers or space aboard their vessels. Dolphin and San Juan moved their operations to Jacksonville, Florida, a port not then subject to the Rules. Bd. Petition 93a-94a.

Houff, Associated, TMTA, Dolphin and San Juan all filed unfair labor practice charges against the sea carriers and the ILA charging that the Rules violated §§8(e) and 8(b)(4)(ii)(B) of the Act. Preliminary injunctions under §10(l) of the Act, 29 U.S.C. §160(l), were sought in the United States District Court for the Eastern District of Virginia and for the District of Maryland. The District of Maryland granted the injunction. *Humphrey v. International Longshoremen's Ass'n,* No. Y-75-1395 (D. Md. March 25, 1976). The Eastern District of Virginia denied the injunction, but the United States Court of Appeals for the Fourth Circuit reversed and mandated that the injunction issue. *Humphrey v. International Longshoremen's Ass'n,* 401 F. Supp. 1401 (E.D. Va. 1975), *rev'd,* 548 F.2d 494 (4th Cir. 1977).

VI. SUMMARY OF ARGUMENT

The ILA Rules on Containers violate §§8(e) and 8(b)(4)(ii)(B), because an object of the Rules is to force the sea carriers to cease doing business with NVOCC consolidators, motor carriers and public warehousemen regarding the stripping and stuffing of certain containers within an arbitrary 50-mile radius of the seaports of New York, Baltimore and Hampton Roads. The ILA argues that it is merely trying to retain its traditional work of handling cargo on the pier which the development of containerization has caused to be moved inland to the facilities of consolidators, motor freight terminals, and public warehouses. The ILA argues that loading and unloading of containers off the piers is ILA work the same as mortising of doors was the work of job site carpenters in *National Woodwork Manufacturers Ass'n v. NLRB,* 386 U.S. 612 (1967).

However, it is error to characterize the contested work as handling cargo a parcel at a time, because this fails to take into account the complete elimination of traditional ILA work by containerization and the development of new and different work off its piers. The work at issue is the stripping and stuffing of containers within a functionally integrated rail-highway-sea container transportation system designed to move cargo without multiple handling of pieces of cargo. The container freight transportation system was designed to bridge individual parcel handling at many stages of the movement of goods from vender to ultimate consignee. The container system was designed to send the containers away from the seaport terminals to the premises of shippers and consignees or their agents to give them greater flexibility in moving goods across land and sea. Loading and unloading containers at certain key points in the transportation system (the premises

of consolidators, motor carriers and warehousemen) where containers were functionally designed to be stripped and stuffed, is work of a new and different nature and kind than the traditional ILA work.

Furthermore, most stripping and stuffing of reusable containers was traditionally done off the pier for at least 8 to 10 years before the ILA negotiated its first Rules seeking to acquire some of this work. In the Ports of Baltimore and Hampton Roads it was 18 to 20 years after containers were used before the ILA made any effort to try to monopolize stripping of FSL loads passing through the ports via motor carrier and public warehouse. The ILA's failure to claim this highly visible work evidences its recognition that the work was not its work. Identical work being performed in different bargaining units does not give one union the legal right to monopolize the work in another bargaining unit. Congress enacted §§8(e) and 8(b)(4)(ii)(B) to prevent unions, particularly in the freight transportation industry, from forcing employers to take work from other bargaining units and give it to them, simply because they had the power to achieve that objective.

The Board has developed complete records of the historical work patterns of the ILA and other concerned employees and has held that NVOCC consolidators, like Consolidated Express and Dolphin, are themselves customers of sea carriers and shippers, which perform their own work when they stuff containers for road and sea movement. *International Longshoremen's Ass'n (Consolidated Express)*, 221 N.L.R.B. 956 (1975); *International Longshoremen's Ass'n (Dolphin Forwarding, Inc.)*, 236 N.L.R.B. No. 42 (1978). For the same reasons the Board has held that the Rules can not be enforced against deconsolidation operations in Puerto Rico. *International Longshoremen's Ass'n, Local 1575 (San Juan Freight Forwarders, Inc.)*, 226

N.L.R.B. 34 (1976). The Board has similarly held that motor carriers and public warehousemen are consignees or their agents, which have always performed cargo handling, including the stripping of containers at their own facilities. *International Longshoremen's Ass'n (Associated Transfer, Inc., Houff Transfer, Inc. and Tidewater Motor Truck Association)*, 231 N.L.R.B. 351 (1977).

The Second Circuit Court of Appeals confirmed the Board's holding in *Consolidated Express, Inc.*, finding that the decision was supported by substantial evidence and was analytically sound; the traditional work of ILA members did not include stripping and stuffing of containers off the piers. *ILA v. NLRB*, 537 F.2d 706 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977), *rehearing deined*, 430 U.S. 911 (1977). The First Circuit Court of Appeals reached the same conclusion in affirming the Board in *International Longshoremen's Ass'n, Local 1575 v. NLRB*, 560 F.2d 439 (1st Cir. 1977). The Fourth Circuit Court of Appeals, in mandating a §10(l) injunction against enforcement of the ILA Rules against Associated, Houff and TMTA held that the record in that case, virtually identical to the record below, required the conclusion that the traditional work of the ILA did not include the work of stripping and stuffing containers off the piers. *Humphrey v. International Longshoremen's Ass'n*, 401 F.2d 494 (4th Cir. 1977). Substantial evidence in the record of the case below amply supports the identical conclusion herein.[20]

Even if the contested work was traditional ILA work, the sea carriers have no power to control the work and

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20. Other Board cases have similarly struck down the Rules. *International Longshoremen's Association (Beck Arabia, Ltd.)*, 245 N.L.R.B. No. 172 (1979), *appeal docketed*, No. 79-1672 (4th Cir. Oct. 16, 1979) and *International Longshoremen's Association, Local 1408 (Puerto Rico Marine Management, Inc.)*, 245 N.L.R.B. No. 171 (1979), *appeal docketed*, No. 79-3444 (5th Cir. Oct. 16, 1979).

give it to the ILA or to prevent non-sea carrier employers from performing this work off the piers. The Court of Appeals erroneously held that because the sea carriers own the containers and have physical control of them while on the seaport terminal premises, they have the power to either permit ILA members to strip and stuff the containers at the piers or require their customers to accede to the conditions in the Rules for the privilege of leasing containers. Such control, the ILA argued, is like the control exercised by the primary employer of the job site carpenters in *National Woodwork* which could choose to continue to have the doors mortised on the job site, rather than at the manufacturer, pursuant to its agreement with the union.

However, the sea carriers do not have the legal right to control the containers as required by the Rules. The containers are part of the equipment and service provided by the sea carriers to customers. Sections 14 Fourth and 16 First of the Shipping Act, 1916, 46 U.S.C. §§812 and 815 (Shipping Act), prohibit the sea carriers from refusing to lease containers to any customers because they won't agree to the conditions in the Rules or to seek indemnification for fines paid on a discriminatory basis against lessees of the containers, within the 50-mile limit but not those outside the 50-mile limit. *Swayne & Hoyt, Ltd. v. United States,* 300 U.S. 297 (1937); *California v. United States,* 320 U.S. 577, *rehearing denied,* 321 U.S. 802 (1944); *FMB v. Isbrandtsen Co.,* 356 U.S. 481 (1958); *FMC v. Pacific Maritime Ass'n,* 435 U.S. 40 (1978); *Volkswagenwerk v. FMC,* 390 U.S. 261 (1968); *Grace Line, Inc. v. FMB,* 280 F.2d 790 (2d Cir. 1960), *cert. denied,* 364 U.S. 933 (1961); *Flota Mercante Grancolombiana, S.A. v. FMC,* 302 F.2d 887 (D.C. Cir. 1962). Containers constitute cargo space accommodations and a basic facility of transportation aboard containerships. *DuPont de Nemours Int'l, S.A. v. S.S. Mor-*

macvega, 493 F.2d 97 (2d Cir. 1974). The Federal Maritime Commission has closely examined the Rules on Containers, and held that a NVOCC is a shipper or consignee in relation to a sea carrier and cannot be treated on a discriminatory basis because of the Rules in relation to other shippers or consignees. Federal Maritime Commission Nos. 73-17 (Sea-Land Service, Inc.) and 74-40 (Puerto Rico Maritime Shipping Authority 1978), *appeal pending, CONASA and NYSA v. FMC,* No. 78-1776 (D.C. 1978).[21]

Moreover, the tariffs filed by sea carriers with the Federal Maritime Commission guarantee a variety of shipping services, deprive the sea carriers of the power to enforce the Rules. Under Tariffs existing in 1973 when the Dublin Supplement was negotiated, the sea carriers offered as service the right of shippers to stuff or strip containers away from the piers or ship them by through bills of lading through the sea ports to consignees or their agents. These tariffs prevented the sea carriers from thereafter giving the work of stripping and stuffing containers to the ILA members at the seaport terminals. Therefore, the sea carriers do not have the legal power to prevent the unconditional release of containers to shippers and consignees of their agents.

Furthermore, before the leased containers reach the sea terminals and after they leave there, the sea carriers

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21. In another case involving the Rules, Administrative Law Judge Norman D. Kline ruled in a proceeding before the Federal Maritime Commission that an attempt by a sea carrier to charge consolidators operating within the 50-mile radius a higher rate because of the Cost of the Rules was an unlawful attempt at a "group boycott aimed at one segment of the consolidation industry found to be serving the public interest by the Commission" FMC No. 77-23, Agreement No. 10294 (Dec. 13, 1979); exceptions filed on or about January 14, 1980.

have no power to prevent non-sea carrier employers from stripping and stuffing the containers. Consolidators, motor carriers, and warehousemen are not parties to the Rules agreement, and equipment interchange agreements do not control stripping and stuffing. Bills of lading issued by shippers such as NVOCC's and motor carriers pursuant to the Shipping Act and the Interstate Commerce Act, make these employers responsible for the content of the freight in the containers and give them free control over their stripping and stuffing. The sea carriers have no legal power to interfere with this control.

Because of the lack of the right to control the stripping and stuffing of containers the Supreme Court's decision in *NLRB v. Enterprise Association of Pipefitters*, 429 U.S. 507 (1977) mandates a finding that the Rules and their enforcement violate §§8(e) and 8(b)(4)(ii)(B).

VII. ARGUMENT

A. General Principles of Law and Reversible Errors of the Court of Appeals.

Section 8(e) of the Act was passed to prevent unions from negotiating "hot cargo" agreements to achieve the objectives proscribed by §8(b)(4)(ii)(B). The language of §8(e) is broad, and on its face reaches the Rules in this case. By their terms and effect, the Rules require the sea carriers "to cease doing business with" consolidators, warehousemen, and motor carriers. Nevertheless, the Supreme Court has interpreted §8(e) narrowly, finding that "Congress in enacting §8(e), had no thought of prohibiting agreements directed to work preservation;" its objective was to prevent "agreements which obliged neutral employers not to do business with other employers involved

in labor disputes with the union". *National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. 635, 636 (1967).[22]

Section 8(b)(4)(ii)(B) was designed to prohibit a union from enforcing an agreement proscribed by §8(e), or otherwise to engage in or threaten, coerce, or restrain any person where "an object" thereof is to force any person "to cease doing business with any other person." All that is necessary for a violation of §8(b)(4)(ii)(B) is that an objective, though not necessarily the only objective, of the union's secondary action is to force the contracting neutral employer with whom the union has a secondary dispute to cease doing business with the employer with whom the union has a primary dispute. *National Woodwork*, 386 U.S. at 612; *Enterprise Association of Pipefitters*, 429 U.S. 507, 530, n.17 (1977); *NLRB v. Denver Building and Construction Trades Council*, 341 U.S. 675, 689 (1951).

It has been settled beyond dispute that no matter how compelling the reasons a union and an employer cannot lawfully negotiate an agreement proscribed by §8(e), or enforce one valid under §8(e) by means that would violate §8(b)(4). *Enterprise Association*, 429 U.S. 514-521; *National Woodwork*, 386 U.S. at 634; *Local 1976, United Brotherhood of Carpenters v. Labor Board*, 357 U.S. 93 (1958) (*Sand Door*). The Court of Appeals recognized this principle, even in erroneously deciding that the Rules did not violate the Act. Bd. Petition 61a.

There is no dispute regarding most of the other elements of §§8(e) and 8(b)(4)(ii)(B). The Rules are an agreement

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22. Justice Stewart dissented, reasoning that product boycotts for work preservation purposes were intended to be proscribed by §8(e) because they "are likely to be permanent, and the restraint on the free flow of goods in commerce is direct and pervasive, not limited to goods manufactured by a particular employer with whom the union may have a given dispute." 386 U.S. at 656.

which expressly require that LCL and "short stopped" FSL containers be stripped and stuffed "only at a waterfront facility by deepsea ILA labor." Rule 1(a), Jt. App. 255. This agreement expressly prevents the sea carriers from doing business as they have been with consolidators, warehousemen and motor carriers. The Rules provide for "liquidated damages," clearly a punitive fine, and by the threat of strike if the fines are not paid by the sea carriers. The fines had their intended effect when the sea carriers ceased to do business with Associated, Dolphin, and Houff. These companies were presented with a choice of paying for the fines or choosing the similar injurious alternative of ceasing to do business with the sea carriers.

Fines are a type of economic pressure proscribed by the Act. *Electro-Coal Transfer Corp.*, 591 F.2d 284 (5th Cir.), *rehearing and rehearing en banc denied*, 595 F.2d 1221 (1979); *Associated General Contractors of California, Inc.*, 514 F.2d 433, 438-39 (9th Cir. 1975); *Carrier Air Conditioning Co. v. NLRB*, 547 F.2d 1178, 1193 (4th Cir. 1976). In *Electro-Coal* the ILA demanded that a sea carrier with which it had a work protective agreement make a payment for wages lost by ILA members in the Port of New Orleans because non-ILA labor employed by subcontractor Electro-Coal was used to load a ship. The Court of Appeals held:

> The employers [sea carriers] thus pay double labor costs for the privilege of loading at Electro-Coal. We do not think any company could continue such an arrangement except for the most compelling business reasons. The reasons here are found in the employers' need to meet large grain export commitments. The demand for settlement payments was coercive within the meaning of §8(b)(4)(ii)(B), and it was unlawfully coercive if undertaken to achieve a secondary objective. 591 F.2d at 289.[23]

Thus, the only disputed legal element to be resolved by the Supreme Court is the pivotal question of whether there was substantial evidence to support the Board's finding that "an object" of the Rules was proscribed by the Act. The Supreme Court has established guidelines for determining the real object of a union's attempt to claim work. The Court held:

> There need not be an actual dispute with the boycotted employer, here the door manufacturer, [herein the consolidators, warehousemen and motor carriers] for the activity to fall within this category, so long as the tactical object of the agreement and its maintenance is that employer, or benefits to other than the boycotting employees or other employees of the primary employer *thus making the agreement or boycott secondary in its aim.* The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees. *National Woodwork*, 386 U.S. at 645. (Emphasis added).

The Court has directed that object not be defined, "without an inquiry into whether under all the surrounding circumstances, the Union's objective was preservation of work [in the bargaining unit] . . . or whether the agreement and boycott were tactically calculated to satisfy union objectives elsewhere." 386 U.S. at 644. The Court suggested that as a general proposition "such circumstances might include the remoteness of the threat of displacement

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23. Electro-Coal brought the suit to recover damages under §303 of the Act for the secondary boycott. The Court of Appeals remanded the case to the district court for further development of the record on the scope of the traditional work of the ILA.

by the banned product or services, the history of labor relations between the union and the employers who would be boycotted, and the economic personality of the industry." 386 U.S. at 644, n.38.

In its reconfirmation of *National Woodwork*, the Court approved of another criteria for determining the real object of the work acquisition efforts. In *Enterprise Association* the Court held that when factory piped heating and air conditioning units had been specified by the general contractor to be installed on the job site, the subcontractor employer had no choice but to install them; and it was without power to meet the work preservation demands of its employees to have them cut and thread pipe for the units as they had historically done. The Court found, therefore, that "an object" of the inducement and the coercion was to cause the subcontractor to cease doing business with the primary contractor in order to influence the primary contractor to specify different equipment. The "control" standard was held to be merely a part of the "totality-of-the-circumstances test recognized in *National Woodwork*." 429 U.S. at 524.

The Court of Appeals misapplied the teachings of *National Woodwork* and *Enterprise Association* in three main respects. First, the Court improperly substituted its judgment for that of the administrative agency having expertise in resolving disputes arising out of competing claims for work. Second, the Court of Appeals misdirected the focus of examination of the contested work, solely the scope of the traditional work duties performed by the ILA. Third, the Court of Appeals misconstrued or ignored the elements of control which require, as a matter of law, a finding that an object of the Rules was to exert pressure upon sea carriers to provide work to the ILA which they had no power or authority to give. If the Court agrees with any of these grounds, it must reverse the decision below.

B. The Court of Appeals Erroneously Substituted Its Judgment for the Opinion of the NLRB As to the Work and Total Circumstances.

The Court of Appeals improperly substituted its judgment for that of the Board in defining the ILA's traditional work and applying the surrounding circumstances test to determine the true objective of the Rules and the ILA's efforts to enforce them. In *Dolphin* the Board held that "traditionally the off-pier stuffing and stripping of containers was performed by consolidating companies and not longshoremen." In *Associated* the Board reached the ultimate conclusion that "Respondents' members here, as in *Consolidated Express*, had *not* historically done the work." Bd. Petition 116a. The Board noted that irrespective of its decision in *Consolidated Express*, "the Administrative Law Judge fully developed the facts here to support the violations which he found." Bd. Petition 115a.

The Court of Appeals erroneously chose to characterize these largely factual findings as legal conclusions. It said its "conflict with the NLRB is exclusively focused on the Board's misinterpretation and misapplication of the prevailing law—the doctrine of work preservation," because when the Board defined the work in controversy it "settled on off-pier stripping and stuffing of containers" as the definition of the work in controversy, rather than focusing on the "traditional work patterns" of longshoremen in loading and unloading ocean borne cargo into and out of the hold of the ship. Bd. Petition 51a. The Court of Appeals did not find that the Board did not consider the historical work practices of the ILA members. It simply reached a different conclusion than the Board as to what was the ILA's traditional work. The Court erred in doing this. So long as the Board's definition of the contested work was supported by substantial evidence on

the record as it was and there was a rational basis for the Board's decision, as there was,[24] the Court of Appeals was not authorized to substitute its judgment for that of the Board. Such was the teaching of *Enterprise Association*, 429 U.S. at 531-32; and *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

The Court of Appeals for the First and Second Circuits found on similar records that the Board's determinations that traditional ILA work was limited to seaport terminal premises, and therefore the Rules violated the Act, were supported by substantial evidence. *International Longshoremen's Ass'n, Local 1575 v. NLRB*, 560 F.2d at 448 (1st Cir. 1977); *Consolidated Express, Inc.*, 537 F.2d at 706, 712 (2d Cir. 1977). The Court of Appeals below should have held the same.

C. The Object of the Rules Was to Acquire New Work Not Traditionally Performed by ILA Members.

1. The Scope of the Traditional Work to Be Protected.

The Court of Appeals found that the Board improperly failed to focus on the appropriate definition of the protectible work. It suggested that the Board might have reached a "different categorization for the work in controversy" had it focused on defining "a category of work based on work patterns both prior and subsequent to the innovation," and had not "define[d] work in controversy specifically in terms of the innovation, thus *by definition* removing any opportunity for pre-innovation workers to preserve their work." Bd. Petition 47a. The Court suggested that the proper definition of the contested work is "loading and unloading of ocean-borne cargo, with its directly related peripheral tasks such as sorting cargo. Bd. Petition 51a. We disagree with the narrow focus of this definition.

24. The Board of Appeals for the District of Columbia has recognized that its function is to determine only whether the Board had a "rational basis for its decision." *International Ladies' Garment Workers Union v. NLRB (McLoughlin Mfg. Corp.)*, 463 F.2d 907, 919 (D.C. Cir. 1972).

In *Dolphin* the Board held that the stuffing of containers for export by the NVOCC was not traditional longshore work, relying on its analysis of the identical work in *Consolidated Express, Inc.*, wherein it held:

> It is clear from the record that *the work in controversy here is the LCL and LTL container work performed by Consolidated and Twin at their off-pier premises.*
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> * * *
>
> The traditional work of the longshoremen represented by ILA has been to load and unload ships. When necessary to perform their loading and unloading work, longshoremen have been required to stuff and strip containers on the piers.
>
> Similarly, for many years, maritime cargo has been sorted and consolidated off the docks for companies employing teamsters and unrepresented employees. With the advent of vessels designed exclusively to carry the large containers presently in use, these consolidating companies such as Consolidated and Twin, have continued to consolidate shipments into containers prior to their placement aboard the vessels. *The consolidators generate such work themselves, performing it not on behalf of the employer-members of NYSA but for their own customers who have goods to ship.* Furthermore, they perform this consolidation work at their own off-pier premises, with their own employees who are outside the unit represented by ILA,

and who fall within the coverage of separate collective-bargaining agreements, under which they are represented by other labor organizations. It is clear, therefore, that Consolidated and Twin have traditionally been engaged in the work of stuffing and stripping containers such as are here in controversy.

From the foregoing and the record as a whole, it is clear that the *on-pier stripping and stuffing work performed by longshoremen as an incident of loading and unloading ships does not embrace the work traditionally performed by Consolidated and Twin at their own off-pier premises.* It does not fall within ILA's traditional role to engage in make-work measures by insisting upon stripping and stuffing cargo merely because that cargo was originally containerized by non-unit personnel. Yet, ILA's demands here could only be met if the work traditionally performed off the pier by employees outside the longshoremen unit were taken over and performed at the pier by longshoremen represented by ILA. 221 N.L.R.B. at 959-960. (Emphasis added).

In *Associated,* a case involving stripping of import containers by motor carriers and warehousemen, the Board adopted the Administrative Law Judge's decision that:

> The history of the longshoremen's work tradition in Baltimore and Hampton Roads shows that their role in handling break-bulk import cargo ended at the head of the pier, where an ILA freight handler picked up the cargo and loaded it onto a truck. Thereafter, the fate of that cargo was the responsibility of the motor carrier, as set forth in the bill of lading.
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> * * *
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> From the foregoing and the record as a whole, I find that the traditional on-pier work of longshoremen has not included the work performed by the employees of motor carriers, as Associated and Houff, at their off-pier facilities. Bd. Petition 164a-165a.

Laying aside for a moment the geographic location of the work, it is clear that at least the contested work is the loading and unloading of containers, not the loading and unloading of a ship tied at the pier. It is the loading and unloading of containers, not break-bulk work, which the ILA feels should be performed by its members.

There is no dispute that the ILA traditionally performed the work of loading and unloading of ships a parcel at a time. This work is still being performed by the ILA when it handles break-bulk cargo or loads or unloads a container from a ship. However, employees of consolidators loaded consolidated freight into containers for years before the container revolution occurred. Employees of motor carriers and warehousemen traditionally unloaded cargo, stacked it, sorted it, and reloaded it into trucks in a similar manner as the ILA members performed this work at the seaport terminals. It is clear that the ILA's work jurisdiction is limited to the seaport terminal premises,[25] and it does not contend otherwise herein.

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25. The 1968-1971 collective bargaining agreement covering the Ports of Baltimore and Hampton Roads, in which the Rules were first incorporated for those ports, the scope of its traditional ILA work was stated to be limited to "all work of rigging and unrigging of cargo . . . vessels and the loading and discharging of their cargo . . ."; and the Rules "are intended to protect and preserve the work jurisdiction of longshoremen and all other ILA crafts *at deep sea piers or terminals.*" Jt. App. 235; 238. This scope of work remained unchanged in the 1971-1973 agreement. Jt. App. 243. It wasn't until the 1974 agreement that the ILA expanded the definition of the scope of work clause to include: "All stuffing and stripping, handling and movement of containers at waterfront facilities within a 50-mile radius from the center of the port of Hampton Roads . . ." Jt. App. 251-252. However, even in that agreement the preamble to the Rules stated that they covered "all container work at a waterfront facility . . .", defined as: "a pier or dock where vessels are normally worked including a container compound operated by a carrier or direct shipper." Jt. App. 254.

Historically, prior to development of the modern container, ILA members never broke open and handled contents of large shipping containers holding multiple parcels, which were shipped by venders, consolidators or freight forwarders. Furthermore, large reusable containers have been used to consolidate and ship individual parcels by sea since at least the 1940's. Except when security required ILA stripping at the pier, these containers passed through the seaport terminals without ILA stripping and stuffing. Therefore, historically, stripping and stuffing of large reusable and non-resulable containers, containing individual parcels, was not traditional ILA work on or off the pier.

Containerization first began to blossom as a new industry, based on specialized container equipment and shipping services, in the early 1950's with the "coastways business". NVOCC companies, which had been specializing in soliciting customers to ship through them less than full loads, at lower full load rates, were encouraged to develop their business to compete with the railroad industry. The ILA blessed the development of this "new" transportation system, because it did not infringe upon the ILA's traditional break-bulk work at the seaport terminals. Jt. App. 117. By 1957 full use was being made of the new container transportation system be' veen consolidators and deconsolidators.

The container transportation system was not started as a substitute for the business of transporting cargo by sea or for the purpose of competing with the sea carriers. It was started and has since operated as a parallel industry to the break-bulk shipping service traditionally offered by the sea carriers. Sea carriers, unlike NVOCC's do not solicit less than full load cargo for consolidation; they do not prepare all the related shipping papers; they do not ship

or receive containers as the consignor or consignee; they do not warehouse goods; and they do not perform other customer services performed by NVOCC's, warehousemen and motor carriers.

Containerization has simply forced the sea carriers out of the business of handling some cargo a piece at a time at the seaport terminals. But, the sea carriers have not subcontracted out the work of ILA labor.[26] The sea carriers enjoy no profit on the performance of the service of stripping and stuffing containers off the pier. This profit is enjoyed by the charging party employers. Nor is this a case where outside employees are coming into the bargaining unit and performing bargaining unit work belonging to the ILA.[27] This case is also not a model of the type found in *National Woodwork*. There, work performed exclusively on the job site was, in effect, farmed out to a manufacturing company. The work was there incorporated into a product, in the same manner as could have been done on the job site, and then brought back into the bargaining unit for its ultimate use on the job where the bargaining unit worked.

In the present case, a new and different model of work exists. A whole new freight transportation system has de-

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26. Board holding in *Dolphin*. Bd. Petition 95a-96a.

27. For an example of this model see *Canada Dry Corporation v. NLRB*, 421 F.2d 907 (6th Cir. 1970), wherein the union of employees of supermarkets in the Detroit metropolitan area negotiated a contract with the supermarket association which contained an agreement that prevented salesmen of certain venders from shelving their products and performing the related tasks in the unit they previously had performed. The Court of Appeals held this was a lawful work preservation agreement because the contested work was located within the geographic bounds of the bargaining unit and was similar to the work being performed by the unit employees. The same distinction applies to *Meat and Highway Drivers, Local 710 v. NLRB*, 335 F.2d 709 (D.C. Cir. 1964) where the union sought to reacquire the work of delivering meat which work had been removed from Chicago by the same employers. The packers had then shipped the meat back into the geographic jurisdiction of the union by other drivers.

veloped which bridges over and completely eliminates the work historically performed in the bargaining unit. Labor services, formerly performed at the piers by ILA members, have been eliminated, but they have not been replaced by other labor performing a preliminary step of the work on a product to be installed at a job site by job site workers, as in the *National Woodwork* model. No work required for the job site has been performed off the site and brought back. No ILA work has transferred away from the piers which can, if the container system is to work as designed, be performed on the pier.

Containerization has not changed the basic functions of the parties. Sea carriers continue to perform their primary business of hauling cargo by sea, as motor carriers haul cargo by road, and the railroads haul cargo by rail. NVOCC's continue to consolidate and ship cargo, and warehousemen continue to receive the cargo and store it or forward it on as desired by the consignee. Containerization has simply eliminated the need for labor at all stages of movement, not just shifted ILA work to another labor force. The motor carrier used to have to load the break-bulk cargo into the truck at the pier, and haul it to a freight terminal to redistribute it for shipment to various points. Since containerization both the ILA and motor carrier labor at the pier has been eliminated. The freight transportation industry has simply gone through a metamorphosis—a complete change in structure and nature. As the caterpillar turns into a butterfly, so has the break-bulk freight handling system turned into the container transportation system.

The ILA's argument that stripping and stuffing the container is like unloading the hold of a ship is only partially true. The container is like a chameleon. It performs different functions at different times, at different

geographic locations, and for different people. It may be that the container is part of the hold of the ship, while it is on the ship, and perhaps even for purposes of workmen's compensation after it is on the ground, as stated in the Supreme Court in *Northeast Marine Terminal Company, Inc. v. Caputo,* 432 U.S. 249, 270 (1977).[28] However, the container changes its nature when it becomes a part of the motor carrier's truck or a part of the railroad car. The ILA's rights with respect to containers change as the use of the container changes.

Containers cannot be viewed in isolation. They are a part of an entire sophisticated transportation system. The sea carriers, like the motor carriers and the railroads, are merely links of the entire container transportation system. From beginning to end the container transportation system is functionally integrated, but employers which interface with one another in the chain are separately owned and provide separate functions. Special equipment has been designed and purchased by sea carriers, motor carriers, and rail carriers. Warehouses and motor carrier freight stations have been built to accommodate the needs and desires of consignors and consignees. The new transportation system provides a flexibility never before possible under the old system. For example, some venders now use a port area warehouse as a distribution center, not just as a warehouse. The requirement that containers must be stripped at the pier unless warehoused for 30 days discourages venders from doing business with warehousemen

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28. In *Caputo* the Court was required to interpret the reach of the new amendment to the Longshoremen and Harbor Workers Compensation Act which extended coverage landward beyond the waterline. The Court said that Congress had, by the amendment, "moved the line" for purposes of coverage, but limited it to the "situs" of the pier and surrounding storage areas under the control of the sea carriers where maritime employees worked. This is precisely the line drawn by the Board herein in defining the work of longshoremen as traditionally having been performed at the situs of the seaport terminals.

who cannot quickly deliver to their customers.[29] Distribution services have never been done from the piers under the old break-bulk system, and cannot now be performed there.

Where, as here, the technological advances have so changed the nature of the work that it cannot be performed at the job site, without changing the nature of the technological advancement, the new work cannot be considered as part of the traditional bargaining unit work. Such was the holding of *Carrier Air Conditioning Co. v. NLRB*, 547 F.2d 1178, 1187 (2d Cir. 1976), where job site sheetmetal workers were held to have violated §8(e) and §8(b)(4) of the Act because they had "traditionally fabricated and installed the plenums on *conventional* air conditioning units," but not on "a new and different product." In a similar case a scrub sink, manufactured with parts similar to those worked on in the bargaining unit, was held to be a new and different product because the "installation of the special valves and piping in these sinks was not work traditionally and historically performed by on site plumbers, who were found to be not qualified or equipped to do this work. *Associated General Contractors of California, Inc. v. NLRB*, 514 F.2d 433, 438 (9th Cir. 1975). Here the work is new, not because the ILA members do not have the skill or capacity to do the work, but because ILA members are not qualified and equipped to do the work of stripping and stuffing containers off the pier where this new work is required to be performed by shippers, consignees and the nature of the container transportation system.

The record reflects that the Board considered the full nature of the containerization system in reaching its de-

29. Not only does the 30 day limit delay ultimate shipment, but when the ILA forced the stripping of all containers in the Port of Norfolk, prior to negotiating the 1975 Supplemental Agreement, it slowed the movement of cargo in containers from five to eight days. Jt. App. 205.

cision. The Courts of Appeals for the First, Second and Fourth Circuits agreed with the Board's analysis of the protectible work. The First Circuit held:

> The Board's definition of the work in question *as the stripping and stuffing of vans consigned to freight consolidators* is supported by substantial evidence and within its discretion. Once we accept this definition, we readily agree that the work in question was not traditionally done by the longshoremen. *International Longshoremen's Ass'n, Local 1575 v. NLRB*, 560 F.2d 439, 447 (1st Cir. 1977). (Emphasis added).

The Second Circuit agreed in *International Longshoremen's Ass'n v. NLRB*, 537 F.2d 706, 712 (2d Cir. 1976). When the Fourth Circuit examined an almost identical record to that below in *Associated*, it held:

> [T]he "stripping" of these full shippers loads by the truckers is not part of the *process of loading and unloading cargo of ships;* rather it is done to facilitate as part of the motor carriers task of transporting the goods from the pier to the consignee. Consequently (and not surprisingly), this work has traditionally been performed by employees of the motor carrier. It follows that such "stripping" does not fall within the bounds of the longshoremen's traditional role and that the challenged rules were unlawful "work acquisition" measures . . . *Humphrey v. International Longshoremen's Ass'n*, 548 F.2d 494, 499 (4th Cir. 1977). (Emphasis added).[30]

30. If the Court of Appeals was correct below in characterizing the definition of work as involving a legal standard, rather than a factual conclusion, then the Fourth Circuit's conclusion to the contrary carries just as much weight; and the significance of its conclusion is not diminished because it did not occur in the context of an unfair labor practice proceeding which would have required the Court to apply the substantial evidence test to the legal standard.

We submit that this is the only conclusion which makes any sense under the total circumstances.

The Court of Appeals for the District of Columbia Circuit did not say it disagreed with the Board's conclusion as to traditional ILA work, it merely held that the conclusion could not be reached without analysis by the Board within the framework the Court set forth. The Court even recognized the revolutionary impact of containerization on the land and sea transportation industries, and sensed that containerization created new work.

> When a technological innovation is introduced in the work place, *new work* may be created and may initially be performed, *as in these cases,* by employees other than those who worked with the old technology. The crucial question is how best to rationalize the work that results from the innovation into traditional work patterns. Bd. Petition 47a. (Emphasis added).

We believe the Court made a crucial reversible error in holding that the Act permits the Board or the Court to "rationalize the work" that results from the innovation into traditional work patterns. The proper test centers on whether the work protective agreement seeks to preserve the "traditional work" of the bargaining unit, not whether there is other similar work being performed by other employees which somehow the boycotting union can grab and claim to own. If this were the test the Teamsters Union would be able to claim all the trucking work. In *National Woodwork* the Supreme Court permitted the preservation "of work traditionally performed by the jobsite carpenters," and said that the conduct of the union was "related solely to preservation of traditional tasks of the jobsite carpenters." 386 U.S. at 646. In *Enterprise Association* the Court defined the work in controversy as "the piping work of units specified by any contractor or developer who prefers

and uses pre-piped units." 429 U.S. at 528, n.16. It was this element of customer preference which caused the First Circuit to say when it struck down the Rules that the definition of work had "narrowed significantly" the "range of work which can be protected." *ILA, Local 1575 v. NLRB,* 560 F.2d at 447.

Following the *Enterprise Association* decision, the Court of Appeals for the Fifth Circuit recognized that the proper definition of work depends upon defining with some precision the traditional work of longshoremen, including "whether it is the loading of particular ships wherever they dock in a particular area, or the unloading of all ships that dock at particular facilities." *Electro-Coal Transfer Corp.,* 591 F.2d at 290. Thus, the Court recognized, as contended herein, that the location of the work performed by the ILA is a relevant factor in determining traditional work permitted to be protected. The Board followed this exact reasoning in concluding that the work of stripping and stuffing containers off the pier, albeit identical to job duties performed on occasion on the pier, was not traditional ILA work.

The Board used the same reasoning in holding that the west coast longshoremen union's efforts to claim container work performed off the pier violated §8(b)(4)(ii)(B), *International Longshoremen and Warehousemen's Union,* 208 N.L.R.B. 994 (1974), *affirmed per curiam,* 515 F.2d 1017 (D.C. Cir. 1975), *cert. denied,* 424 U.S. 942 (1976) (*California Cartage*). The Board found that "preparing cargo for shipment in various types of containers is work that had been performed over the years by teamsters and other employees as well as longshoremen." 208 N.L.R.B. at 995.

Determining "traditional work" permitted to be preserved requires, as the record shows was done by the

Board, an evaluation of the precise work performed by the ILA and by the employees of consolidators, warehousemen and motor carriers before and after the introduction of containerization, the location where the work is required, the frequency with which it is performed, the actions of the parties reflecting their understandings as to whom the work belonged, and other circumstances. Rationalizing new work resulting from innovations into traditional work patterns in order to preserve the same number of jobs for employees is an inappropriate method of identifying work which may be protected. The question is what work belongs to the bargaining unit, not how many jobs that work can support. There is substantial evidence on the record to support the Board's decisions which were based on appropriate legal standards.

2. Further Evidence of the Unlawful Object of the Rules.

There is further evidence that the object of the Rules was to acquire work not traditionally performed by the ILA. There is clear evidence by the language of Rule 1(a) that the Rules are aimed at the labor relations of employers other than the sea carriers. Rule 1(a) requires that "containers owned, leased or used by carriers" be loaded or discharged by ILA labor. Jt. App. 255. It is a matter of common understanding that the leasing of a piece of property, real or personal, transfers the enjoyment of that property for all purposes other than ownership or limitations expressly placed on its use. No such limitations are placed on the use of the containers by the interchange agreements between motor carriers and sea carriers. Nevertheless, the sea carriers have been forced by the ILA to superimpose the conditions of the Rules on motor carriers and others not bound by any such agreement.

Moreover, for the ILA to insist that its members strip and stuff all containers within 50 miles of the seaports which are owned by someone other than a sea carrier and merely "used by carriers" to transport freight across the sea, demonstrates that the object of the Rules is directed toward the labor relations of container owners other than the sea carriers. For CONASA and the ILA to agree to apply the Rules to containers owned by a non-sea carrier, who wishes to use his own employees to do this work, and not pay double for the privilege of shipping his box of goods by sea carrier, clearly violates §§8(e) and 8(b)(4).

There is further evidence of the unlawful object of the Rules. Stripping and stuffing of containers requires essentially the same duties whether performed at the pier, in a warehouse 49 miles from the pier, in a motor truck terminal 51 miles from the pier, or at shippers', consignees', or consolidators' facilities wherever located. The container does not change its nature simply because it is stripped and stuffed by a consolidator, warehouseman, or motor carrier, rather than a shipper or ultimate consignee. Therefore, the nature of the employer doing the work has no bearing on the identification of ILA work.

The work of stripping and stuffing of containers has remained unchanged since the 1940's. The failure of the ILA to claim any portion of container work until 1959, in the Port of New York, and its failure to claim at least FSL loads in the Ports of Baltimore and Hampton Roads until 1968, demonstrates a recognition that the work did not traditionally belong to the ILA. From their inception the Rules have been repeatedly broadened so as to capture more and more of the container work for ILA members. The 50-mile radius is purely an arbitrary definition of geographic reach of the Rules. The

ILA does not even recognize this limit if it determines that a terminal facility has been set up by an employer beyond the 50-mile limit "for the purpose of evading the provisions of the Rules." Jt. App. 259. ILA representatives further believe that the Rules are violated any time a container is stripped at any location, even hundreds of miles from the port area, before it reaches its ultimate destination.

D. The Lack of Control of the Sea Carriers Over the Containers Demonstrates the Secondary Object of the Rules.

In *Enterprise Association* this Court held that regardless of whose work it was, the lack of power or control by an employer to accede to the work preservation demands of its employees was evidence of the true objective of the union to direct secondary pressure against this neutral employer in order to pressure another employer to give up the work sought by the union. 429 U.S. at 521. The Board had found that the union's pressure on a subcontractor, Hudik-Ross Co., Inc., not to install pre-piped climate control units constituted illegal secondary activity because Hudik's contract with its general contractor, Austin Company, Inc., specified the installation of pre-piped units, and therefore Hudik was incapable of assigning its employees the piping work; such work was never Hudik's to assign in the first place. In other words, Hudik had no power to accede to the union's demands.[31] The Board concluded that the union was exerting prohibited

31. The concept of "power" to assign work clearly contemplates the *legal* ability to accede to the union's demands. In an earlier case involving *Enterprise Association Local Union No. 638*, 183 N.L.R.B. 516 n.2 (1970), the Board stated in pertinent part that "[w]e agree with the Trial Examiner's conclusion that, at the time of the Respondent's August 1969 activities Courter was a neutral because 'there was no legal method by which Courter could comply with the Union's demands to fabricate the pipe'."

pressure on Hudik with an object of either forcing a change in Austin's manner of doing business or forcing Hudik to terminate its subcontract with Austin. Recognizing the validity of the Board's analysis, this Court emphasized that the gravamen of the unlawful conduct was that:

> The union sought to enforce its contract with Hudik by a jobsite product boycott by which the steamfitters asserted their rights to the cutting and threading work on the Norwegian Home project. It is uncontrovertible that *the work at this site could not be secured by pressure on Hudik alone and that the union's work objectives could not be obtained without exerting pressure on Austin as well.* 429 U.S. at 529-30. (Emphasis added).

The Court held that a union's attempt to pressure an employer, even an employer with whom it has a collective bargaining agreement, to assign work over which the employer has no "right of control" is "strong evidence" that the union's activities are "*intend[ed] to exert pressure on one or more other employers*" who do have power to control the work which the union seeks to obtain, and that the union's actions therefore have an illegal secondary objective. 429 U.S. 526 (Emphasis added). Such an event was part of the total circumstances pointing toward the proscribed objective. 429 U.S. 527 n.15, 526.[32] In this

32. The illegal secondary objective need not be the union's sole purpose. As long as the "tactical object" of the union's actions, 386 U.S. at 645, is to "exert pressure on one or more other employers," 429 U.S. at 526, the union's activity falls within the prohibition of §8(b)(4)(ii)(B). *See Electro-Coal Transfer Corp. v. General Longshore Workers, I.L.A., Local Nos. 1418 and 1419, et al.*, 591 F.2d 284, at 291 (5th Cir.), *rehearing and rehearing en banc denied*, 595 F.2d 1221 (1979).

In addition to the recognition of the Board's "right of control" test by the Court of Appeals for the Fourth Circuit in *George Koch Sons, Inc. v. NLRB*, 490 F.2d 323 (1973), and by

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case the vender or consignee ultimately specifies which employer moves the containers across the land and ships them. Bd. Petition 155a. Usually it is the consolidator, warehouser or motor carrier which is specified. Under *Enterprise Association* the sea carriers can not control this work, so the ILA's pressure on them is unlawful secondary activity.

Furthermore, the law deprives the sea carriers from exercising control over the containers as required by the Rules.

The sea carriers, as common carriers subject to government regulation and the provisions of their own tariffs and shippers' bills of lading, do not possess a legal right to (a) withhold containers or container services from customers on a selective basis, (b) condition access to containers upon compliance with the Rules and indemnification of the sea carriers for fines levied against them pursuant to the Rules, or (c) enforce the Rules or seek reimbursement for fines after the containers are released to motor carriers.

Footnote continued—

the Court of Appeals by the Ninth Circuit in *Associated General Contractors of California v. NLRB*, 514 F.2d 433 (1975), prior to the Court's decision in *Enterprise Association*, this test has been recognized and applied in light of the decision in *Enterprise Association* by the Court of Appeals for the First Circuit in *International Longshoremen's Association, Local 1575, supra*, n.3; by the Court of Appeals for the District of Columbia Circuit in *International Brotherhood of Electrical Workers, Local Union No. 501 v. NLRB*, 566 F.2d 348 (1977); by the Court of Appeals for the Ninth Circuit in *Chamber of Commerce of the United States, etc. v. NLRB*, 574 F.2d 457, *cert. denied*, 439 U.S. 981 (1978); and by the Court of Appeals for the Fifth Circuit in *Electro-Coal Transfer Corp., supra.*

1. Federal Maritime Law Strips the Sea Carriers of the Power to Condition the Use of Containers on Using ILA Labor.

The Court of Appeals stated that the sea carriers' "right of control" over containers is illustrated by their ability to refuse to release containers to motor carriers or consolidators who decline to indemnify the sea carriers for fines levied against them by the ILA under the Rules. However, the sea carriers cannot by law refuse because of the Rules to provide empty containers to consolidators or full containers to motor carriers. They are under an affirmative obligation imposed by law to provide services and facilities, including the use of containers which are an integral aspect of modern maritime transportation, to all persons on a nondiscriminatory basis.

Section 14 Fourth of the Shipping Act of 1916 (Shipping Act),[33] makes it unlawful for any "common carrier by water," whether engaged in interstate or foreign commerce[34] to "unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities . . . [or] (b) the loading and landing of freight in proper condition." Section 16 First of that Act[35] prohibits a common carrier by water from giving "any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever," or subjecting "any particular person, locality or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." The 50-mile radius is totally arbitrary and its enforcement discriminates against sea carriers' customers.

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33. 46 U.S.C. §812.
34. 46 U.S.C. §801.
35. 46 U.S.C. §815.

This Court has repeatedly ruled that the Shipping Act prohibits a sea carrier from providing service upon special terms, *Swayne & Hoyt, Ltd. v. United States,* 300 U.S. 297 (1937) (contract rates for specified commodities unlawful), or upon terms which discriminate against persons who do not or cannot fully utilize the service, *California v. United States,* 320 U.S. 577, *rehearing denied,* 321 U.S. 802 (1944) (discrimination resulting from noncompensatory demurrage charges for wharf storage prohibited), or upon a retaliatory or discriminatory basis, *FMB v. Isbrandtsen Co.,* 356 U.S. 481 (1958). Similarly, the provision of containers by sea carriers for stuffing or stripping by their customers at inland facilities is a basic service of the container transportation system offered by sea carriers. The arbitrary denial of access to containers to motor carriers, freight forwarders, and particularly NVOCC's which also are sea carriers, subjects those persons and shippers using their services, and their "traffic," to an "undue or unreasonable prejudice or disadvantage" of the sort repeatedly condemned by this Court.[36]

Discriminatory shipping service was struck down in *Grace Line, Inc. v. FMB,* 280 F.2d 790 (2d Cir. 1960), *cert.*

36. This was the conclusion reached by Administrative Law Judge Charles E. Morgan in Federal Maritime Commission Nos. 73-17 and 74-40 (1975), *supra,* n.3, finding that "when an ocean carrier supplies equipment (containers) to one shipper but not to a second similar shipper, this action and the tariff rule providing for such action are unjustly discriminatory and unlawful" under §§14, 16, and 18(a) of the Shipping Act, 1916 and §4 of the Shipping Act, 1933. ALJD at 35, 49-50. Most recently, this Court held in *FMC v. Pacific Maritime Ass'n,* 435 U.S. 40 (1978), that a collective bargaining agreement to which two or more common carriers by water are party may be found to violate the Shipping Act if it impacts upon competition among carriers by indiscriminately imposing "employment terms and conditions on employers outside the bargaining unit." 435 U.S. at 62. *See also Volkswagenwerk v. FMC,* 390 U.S. 261 (1968), where the Court held unenforceable a discriminatory system for raising money from sea carriers to pay royalties to the International Longshoremen's and Warehousemen's Fund for the institution of labor-saving devices.

denied, 364 U.S. 933 (1961), wherein the Court of Appeals affirmed an order of the Federal Maritime Board requiring a sea carrier to give all shippers of bananas equal access to its vessels and to cease discriminating against them as to "cargo space accommodations". The court held that the provisions of the Shipping Act prohibiting discrimination by sea carriers in the provision of services were to be construed in the broadest terms:

> [We] think that §§812 and 815 should not be construed to give any "common carrier" the right to "unjustly discriminate against any shipper in the matter of (a) cargo space" (§812), or to "give any undue or unreasonable preference or advantage to any particular person" (§815). The Grace Line's argument presupposes, not only that these duties are limited to "common carriers by water," as of course they are, but also that they are limited to such carriers while they are carrying goods as to which they have "held themselves out as 'common carriers.'" We can see no reason to impute such a limitation upon the definition of "common carrier" in §801. 280 F.2d at 792.[37]

In *Flota Mercante Grancolombiana, S.A. v. FMC,* 302 F. 2d 887 (D.C. Cir. 1962), the Court of Appeals also held that the selective provision of cargo space for the carriage of bananas on an exclusive contract basis violated §§14

37. In *Nat. Ass'n of Regulatory Utility Com'rs v. FCC,* 525 F.2d 630 (D.C. Cir.), *cert. denied,* 425 U.S. 992 (1976), the Court of Appeals for the District of Columbia Circuit also offered an expansive definition of a common carrier and its duties to the public:

> What appears to be essential to the quasi-public character implicit in the common carrier concept is that the carrier "undertakes to carry for all people indifferently . . . ."
>
> * * *
>
> . . . But a carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal. 525 F.2d at 641

and 16 of the Shipping Act. In subsequent proceedings, this Court held that the Federal Maritime Commission had properly concluded that a banana shipper was entitled to reparations from the sea carrier, Flota, because of the carrier's illegal denial of service to the shipper.

> The Maritime Board determined, and the Court of Appeals agreed, that Flota had been guilty of "unfairly" or "unjustly" discriminating against Consolo and of giving an "undue unreasonable preference" to Panama Ecuador in violation of §14 Fourth and §16 First of the Shipping Act. *Consolo v. FMC,* 383 U.S. 607, 622-23 (1966).

As with service, the sea carriers may not lawfully discriminate with respect to the use of container equipment. A container clearly constitutes "cargo space accommodations" and a basic "facility" of transportation aboard a containership. *DuPont de Nemours Int'l, S.A. v. S.S. Mormacvega,* 493 F.2d 97 (2d Cir. 1974). The ILA argues that the container is part of the hold of the ship even on the ground. Obviously it is not part of the hold. It is merely an object transported by the ship in its hold or on its deck. In any case, the sea carriers' denial of access to containers to motor carriers and consolidators is equivalent to the denial of cargo space and shipping opportunities which were condemned in *Grace Line, Inc.* and *Flota Mercante, supra.*

Moreover, it should be recognized that NVOCC's, like Dolphin, are shippers and consignees, and not just agents of shippers.[38] Accordingly, insofar as the Rules define "qualified shipper" to exclude a NVOCC which

38. In Federal Maritime Commission Nos. 73-17 and 74-40 (1975), *supra,* n.3, Administrative Law Judge Morgan noted that a consolidator or NVOCC who consolidates with other exporters' or importers' cargo to make a containerload is a *shipper* or

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consolidates goods and ships them under its own bill of lading, the enforcement of the 50-mile provisions of the Rules conflicts with the regulations promulgated pursuant to the Shipping Act and with the Rules themselves. Jt. App. 255.

The Shipping Act forbids sea carriers to condition the use of containers by motor carriers, warehousemen, and consolidators upon compliance with the Rules or to impose different cargo handling requirements (such that certain containers be stuffed or stripped by ILA deepsea labor) upon some shippers and their agents which are not imposed upon all shippers and their agents alike.[39] Lacking the legal right to withhold containers and container services on a selective basis, the sea carriers therefore lack any "right of control" over the use of containers, including the stuffing and stripping of containers inland,

Footnote continued—

consignee in relation to a sea carrier and must be treated as other shippers and consignees are treated by sea carriers. ALJD at 29. *See also* Hickey, *Intermodal Transportation,* 45 TUL. L. REV. 863, at 876 (1971) (a nonvessel operating common carrier by water "is a common carrier (as at common law) only in relation to its shippers. In relation to the ocean carriers with whom it ships under its own name the NVO is a shipper").

A NVOCC is defined by applicable regulations as a person who provides transportation for hire by water in interstate or foreign commerce, assumes responsibility or has responsibility imposed by law for the goods which he ships, and *"arranges in his own name* with underlying water carriers for the performance of such transportation whether or not owning or controlling the means by which such transportation is effected." 46 C.F.R. §510.21(d) (emphasis added). Thus, a NVOCC acts as a shipper rather than as a freight forwarder when exporting cargo under its own through export bill of lading. 46 C.F.R. §510.22(c).

39. Thus, in Federal Maritime Commission Nos. 73-17 and 74-40, *supra,* n.3, Administrative Law Judge Morgan warned that the provisions of Rule 1(a)(1) of the Rules on Containers which provides that any container "used" by a sea carrier which contains a consolidated containerload originating from or destined for any point within a 50-mile radius of the port shall be stuffed or stripped by ILA deepsea labor, subject to exceptions provided in the Rules, violates §14 of the Shipping Act. ALJD at 36-37.

by shippers, consignees, or their agents. Ownership of the containers by the sea carriers, and the rights of control flowing therefrom, is subordinate to the legal requirement to lease the containers on a nondiscriminatory basis.

2. The Equipment Interchange and Uniform Intermodal Interchange Agreements Prevent the Sea Carriers From Giving the Work to ILA Members.

The imposition of the Rules upon lessees of containers owned by sea carriers violates the equipment interchange agreement itself, which provides that a motor carrier lessee shall have "complete control and supervision of such containers" and "shall control the detail of the work of any employee or agent operating or using said containers." The Rules also violate the Uniform Intermodal Interchange Agreement in effect between certain sea carriers and motor carriers, which provides that the container user "shall have the right of complete control and supervision of equipment while in its possession."

3. Tariffs and Shipping Documents Give Shippers, Consignees, and Their Agents Exclusive Control Over Stuffing and Stripping Containers.

Sea carriers file tariffs with the Federal Maritime Commission[40] providing for the transportation of containerized cargo intact for delivery to a consignee or his agent. Thus, a containerload of cargo, whether shipped directly by a shipper having a beneficial interest in the cargo or by a NVOCC or other consolidator as shipper of a consolidated containerload, may, depending on certain circumstances including the type of bill of lading used, represent a single "package" or cargo for purposes of delivery to a consignee

40. *See* 46 C.F.R. Pt. 536.

or his agent pursuant to a bill of lading, and for purposes of the sea carrier's liability for loss or damage to the containerload of cargo. The courts have increasingly recognized the fact that a container stuffed and sealed by the shipper or his agent and shipped as a containerload of cargo may constitute a single "package" of cargo for purposes of the sea carrier's limitation of liability. *Rosenbruch v. American Export Isbrandtsen Lines, Inc.*, 543 F.2d 967 (2d Cir.), *cert. denied*, 429 U.S. 939 (1976); *Royal Typewriter Co., Div. Litton Bus. Sys., Inc. v. M/V Kulmerland*, 483 F.2d 645 (2d Cir. 1973); *Complaint of Norfolk, Baltimore & Carolina Line, Inc.*, 478 F. Supp. 383 (E.D. Va. 1979); *Lucchese v. Malabe Shipping Co., Inc.*, 351 F. Supp. 588 (D. P.R. 1972); *United Purveyors, Inc. v. Motor Vessel New Yorker*, 250 F. Supp. 102 (S.D. Fla. 1965). When viewed as a single package, a container clearly cannot be broken open for ILA stuffing and stripping.

Regardless of whether the container is viewed as a single package or merely a container of packages, a sea carrier has no authority to break the seal on a container and to restuff its contents into another container using ILA deepsea labor, when that container is shipped intact under a bill of lading providing for the transportation of that designated container in accordance with a tariff filed by the sea carrier with the Federal Maritime Commission.[41] Containers are frequently shipped by NVOCC's and other shippers via through bills of lading, which cover the movement on the land and sea legs of the journey.

41. For example, the tariff filed on behalf of sea carriers with the Federal Maritime Commission by the North Atlantic French Atlantic Freight Conference, effective as amended during the period January 1971 to June 1973, Tariff No. (2) FMC-3, provided for commodity rates graduated into three separate levels

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See, Trailer Marine Transport Corp. v. FMC, 602 F.2d 379 (D.C. Cir. 1979), wherein the Court of Appeals held that such through bills of lading issued on rail-sea-rail transportation were covered by the Interstate Commerce Act, rather than the Intercoastal Shipping Acts. Through selection of an appropriate tariff, a shipper or his consignee retains the right of control over the good shipped in a container by reserving the right, through the bill of lading, to designate an agent who may stuff or strip the container. Thus, while a sea carrier may have physical possession of a container, it does not possess the legal power to authorize unnecessary handling of the cargo sealed in that container.

4. Motor Carriers and NVOCC's Have Absolute Right of Control of Containers in Their Possession.

Whether or not the sea carrier can control containers at the seaports they clearly have no power to control the

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Footnote continued—

of service: container stuffing by a shipper and through shipment of the container for stripping by the consignee or his agent off-pier; container stuffing by a shipper for delivery of the contents to the consignee; and a third level of service for break-bulk, palletized, and/or unitized shipments (Rule 4, Rates). The tariff also permitted a shipper to place a lock on any container provided that the shipper accept responsibility for sending the proper key to the consignee (Rule 13 I), and provided for a special cargo rate for a shipper's exclusive use of a container (Rule 13 L). The tariff precluded the sea carrier's responsibility for any damage resulting from improper stuffing or mixing of cargo, or for any discrepancy in count or concealed damage to the cargo, in a container loaded by a shipper (Rule 13 M). The tariff also provided for tranportation of consolidated containerloads, required that each such container must be stripped by the freight forwarder, consolidator, or his agent away from the premises of the sea carrier, and provided that the consolidator had full responsibility for movement of the container and its contents between the sea carrier's terminal and the facility of the consolidator (Rule 13 T). However, the freight forwarder or consolidator could *elect* to have the container stuffed at the sea carrier's terminal, using services of the sea carrier's stevedores, for an additional charge (Rule 13 T).

stuffing and stripping of containers after they have been delivered to a motor carrier. This principle is supported in the maritime liability case of *Palmer v. Agwilines, Inc.,* 135 F.2d 689 (2d Cir. 1943) wherein the court held:

> In the case at bar the barge and its contents had come within the actual control of the respondent [connecting common carrier by water] at its terminal. It was as much a means of delivery as a railroad car would have been and might as well be used by respondent for the cargo as one of its own lighters. 135 F.2d at 691.

Accord, Mackey v. United States, 197 F.2d 241 (2d Cir. 1952); *Roah Hook Brick Co. v. Erie R. Co.,* 179 F.2d 601 (2d Cir. 1950). This principle of liability also governs the right of control of cargo by common carriers by water subject to the Harter Act[42] and the Carriage of Goods by Sea Act.[43] *Madow Co. v. S.S. Liberty Exporter,* 569 F.2d 1183, 1185 (2d Cir. 1978). NVOCC's are common carriers by water.

Similar legal principles apply to motor carriers. The Interstate Commerce Act requires that all common motor carriers shall issue a receipt or bill of lading for property they receive for transportation, and holds the carrier liable for the freight in its possession with or without a bill of lading.[44] The possession of the container and the bill of lading give the motor carrier the absolute right to strip the container at any point during its movement.[45] The sea carriers have no legal power to turn over a container to

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42. 46 U.S.C. §§190 *et seq.*

43. 46 U.S.C. §§1300 *et seq.*

44. 49 U.S.C. §11707. Recodification of the old law without substantive change. Pub. L. 95-463, §3, October 17, 1978, 92 Stat. 1466.

45. See n.2, *supra.*

a motor carrier and then enforce a condition subsequent that it will not strip the container within 50 miles of the seaport. At this point in the journey only the motor carriers have the right to control the work.

In summary, sea carriers are required by law to offer containers and container services, including container leases, to all customers on an equal basis, and cannot condition or control their use by some motor carriers, warehousemen and consolidators. Sea carriers are required to transport all containerized cargo indiscriminately pursuant to their tariffs, regardless of whom a shipper or consignee has designated to stuff or strip a container. Finally, sea carriers have no right to discriminate against their competitors for consolidation work, even by means of an attempt to "impose bargaining-unit terms on employees outside the unit," *FMC v. Pacific Maritime Ass'n,* 435 U.S. 40, 60 (1978); *see also Volkswagenwerk v. FMC,* 390 U.S. 261 (1968). Clearly, therefore, the sea carriers' lack of power to assign this work to the ILA is conclusive demonstration of the secondary objective proscribed by §8(b)(4)(ii)(B).

VIII. CONCLUSION

There was substantial evidence in the record to support the Board's conclusion that the Rules were negotiated in violation of §8(e) and enforced in violation of §8(b)(4)(ii)(B) of the National Labor Relations Act. The containerization freight transportation system requires new and different work to be performed at different locations than at the seaport terminals. Stripping and stuffing of containers within the functioning of this system has never been performed, except on a relatively few occasions when specified, by ILA labor at the seaport terminals. Furthermore, the sea carriers did not have the legal power to enforce the Rules against consolidators, motor

carriers, and warehousemen. Therefore, the sea carriers became neutral employers who were enmeshed by the ILA in its dispute with the off-pier employers who were doing work coveted by the ILA. The object of the Rules was clearly secondary. The decision of the Court of Appeals for the District of Columbia should be reversed, and the decision of the Board and its order enforced.

Respectfully submitted,

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